NO 81 5944

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

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SUPREME COURT U.S.

CHARLES DWIGHT MESSER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

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CITATION TO OPINION BELOW

The opinion of the Supreme Court of Florida is Messer v. State, 403 So.2d 341 (Fla. 1981), and is set forth in Appendix A. The motion for rehearing and the denial thereof are set forth in Appendix B.

JURISDICTION

Review is sought pursuant to 28 U.S.C. §1257(3). The judgment below was entered June 4, 1981, and petitioner's timely motion for rehearing was denied on October 1, 1981 (Appendix B).

On November 13, 1981, Associate Justice Lewis F. Powell, Jr., granted the motion of petitioner to extend the time for filing this petition until December 30, 1981 (Appendix C).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the constitutionality of a death sentence imposed pursuant to Section 921.141, Florida Statutes (1973), which is set forth in Appendix D. This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Petitioner was tried by jury, convicted of murder in the first degree and robbery, and was sentenced to death. In Messer v. State, 330 So.2d 137 (Fla. 1976), the death sentence was vacated and the cause remanded for another sentencing hearing because the trial judge refused to allow the sentencing jury to know that petitioner's accomplice, Ronald Brown, negotiated a plea of guilty to second degree murder and was sentenced to thirty years imprisonment. (Appendix E).

After the second sentencing proceeding, a sentence of death was again imposed (Appendix F). During this sentencing proceeding, State Attorney Curtis Golden testified, over objection, as to why he plea-bargained with Ronald Brown, but

not with petitioner (Appendix G).

On appeal to the Supreme Court of Florida, petitioner argued, inter alia, that the trial court erred in allowing the State Attorney to testify as to why petitioner was tried for first degree murder and Brown was not, and that the trial court erred in sentencing petitioner to death because the court improperly evaluated the existing aggravating and mitigating circumstances.

The Supreme Court of Florida issued an opinion April 26, 1979, affirming petitioner's death sentence (Appendix H). In response to petitioner's motion for rehearing (Appendix I), the Supreme Court of Florida withdrew its opinion. Messer v. State, 384 So.2d 644 (Fla. 1980) (Appendix J).

June 4, 1981, the Supreme Court of Florida issued its opinion affirming petitioner's death sentence. The Court found no error in allowing the State Attorney to testify as to the disparate treatment of petitioner and Brown. Although the Court found that the trial judge had improperly considered certain aggravating circumstances, it found the error harmless (Appendix A).

Petitioner timely moved for rehearing. In both motions for rehearing, petitioner alleged that the Supreme Court of Florida had, without notice to petitioner, requested the Department of Offender Rehabilitation to send to the Court a copy of the latest psychological report pertaining to petitioner. Petitioner requested a hearing to determine whether such a report was received and considered by the Court (Appendix B and I).

The petition for rehearing was denied October 1, 1981 (Appendix B-7).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Petitioner argued in the trial court and on appeal that allowing the State Attorney to testify was improper rendering

his death sentence unconstitutional in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Petitioner argued in the appellate court that affirmance by the Court of the death sentence where the trial court had relied upon improper considerations in sentencing was contrary to the Eighth and Fourteenth Amendments. Petitioner also asserted before the appellate court that its receipt of secret psychological reports pertaining to death-sentenced defendants would render his death sentence unconstitutional under the Fifth, Sixth, Eighth and Fourteenth Amendments.

REASONS FOR GRANTING WRIT

QUESTIONS PRESENTED

QUESTION I

THE FLORIDA SUPREME COURT'S AFFIRMANCE OF THE IMPOSITION OF THE DEATH SENTENCE UPON PETITIONER VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE COURT IMPROPERLY APPROVED THE PRESENTATION OF TESTIMONY OF THE PROSECUTOR AS TO THE REASONS UNDERLYING HIS EXERCISE OF PROSECUTORIAL DISCRETION, WHICH TESTIMONY SIGNIFICANTLY UNDERMINED THE RELIABILITY OF THE FACT-FINDING PROCESS AND ADDITIONALLY, DEPRIVED PETITIONER OF HIS RIGHT TO A FAIR TRIAL ON THE PENALTY ISSUE.

The Supreme Court of Florida held in petitioner's initial appeal that he should have been allowed during the sentencing portion of the trial to present to the jury the fact that his accomplice, Ronald Brown, negotiated a plea of guilty to the offense of second degree murder and was sentenced to a term of imprisonment of 30 years. Messer v. State, 330 So.2d 137 (Fla. 1976) (Appendix-E). At the second sentencing proceeding, over petitioner's objection, Curtis Golden, State Attorney for the First Judicial Circuit of Florida, was allowed to testify as to the reasons underlying his acceptance of Brown's plea to second degree murder and as to the reasons underlying his refusal to plea bargain with petitioner. In explaining the manner in which he exercised his prosecutorial discretion, Golden testified to facts that were based on hearsay, i.e.: Brown had no previous criminal record; to opinions that were not based upon personal knowledge or upon facts or circumstances which were established by legal evidence presented to the jury, i.e.: petitioner was the leader and Brown was the follower in the criminal episode and petitioner dominated Brown during the criminal episode; and to circumstances that were not relevant to the statutorily enumerated aggravating circumstances, i.e.: Brown was remorseful and petitioner was not. Engaging in rank speculation, Golden rationalized his plea bargain with petitioner's accomplice as follows:

> ...I felt that these mitigating circumstances outweighed or neutralized the aggravating circumstances in the case. And, under the law, if a person is convicted of first degree murder and the jury recommends mercy, and the judge accepts that, then the penalty is life imprisonment. Under the law the maximum penalty for second degree murder is life imprisonment. So I felt that rather than to -- I felt that the mitigating circumstances neutralized the aggravating circumstances in his particular instance. And, I felt for that reason that the jury in all probability would recommend mercy, and the judge would probably grant that....
>
> (Appendix G-8).

Then, exceeding all bounds of propriety, Golden testified that he refused to plea bargain with petitioner and instead prosecuted him for first degree murder because "there were four aggravating circumstances detailed by the statute present" and he "found no mitigating circumstances". (Appendix G-10-11).

The Supreme Court of Florida upheld the admission of this testimony reasoning that it was within the discretion of the trial court to allow the state to explain to the jury, through the testimony of the State Attorney, the reasons for the seemingly disparate treatment of Brown and petitioner (Appendix-A). By so ruling, the Court upheld a sentencing procedure which clearly violates the Eighth and Fourteenth Amendments.

A. THE TESTIMONY PRESENTED UNDERMINES THE RELIABILITY OF THE FACT-FINDING PROCESS WHICH IS CONSTITUTIONALLY NECESSARY TO JUSTIFY IMPOSITION OF THE DEATH PENALTY UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

This Court has recognized that the penalty of death is different in kind from any other punishment. Because of the uniqueness of the death penalty, this Court has indicated that the death penalty cannot be imposed under sentencing procedures which create a substantial risk that it will be inflicted in an arbitrary or capricious manner. Gregg v. Georgia, 428 U.S. 153, 188 (1976). It has been repeatedly emphasized that because of the qualitative difference between the penalty of

death and that of life imprisonment, there is a correspondingly greater need for accurate and reliable sentencing information in the determination that death is the appropriate punishment in a specific case. Gregg, 428 U.S. at 190; Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Gardner v. Florida, 430 U.S. 349 (1977); Lockett v. Ohio, 438 U.S. 586 (1978). "[A]ccurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision." Gregg, 428 U.S. at 190. Further, it is clear that the fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phase of any criminal trial. Presnell v. Georgia, 439 U.S. 14, 15 (1978). Additionally, as noted in Gardner, imposition of a death sentence based upon confidential information which the defendant has no opportunity to deny or explain violates due process.

The decision of the Supreme Court of Florida violates the principles of the foregoing cases because the testimony of the State Attorney, which consisted of opinions and hearsay, was unreliable, irrelevant, not subject to verification, and of such a character that it could not be subjected to meaningful cross-examination. This testimony cannot be characterized as the "accurate and reliable sentencing information" which is constitutionally necessary to make the reasoned determination that death, rather than life imprisonment, is the appropriate punishment.

The issues before the jury at the presentence hearing were whether sufficient statutorily enumerated aggravated circumstances existed, and if so, whether sufficient mitigating circumstances were shown that would outweigh those aggravating circumstances. The testimony of the State Attorney concerning the justifications for and reasons underlying his decision to

plea-bargain with petitioner's accomplice and his refusal to plea bargain with petitioner had absolutely no relevance to the issues before the jury at the presentence hearing. Cf. State v. Groseclose, 615 S.W.2d 142 (Tenn. 1981), cert. denied, 50 U.S.L.W. 3250 (U.S. Oct. 5, 1981), where the court held that testimony relating to the district attorney's refusal to engage in plea bargaining with defendants and to the district attorney's policies concerning his handling of similar cases was properly excluded, although offered by the defense in mitigation at the sentencing hearing, because this testimony presented no issue for jury consideration. The deliberative processes of the State Attorney in determining whether to engage in plea bargaining with a capital defendant has not been deemed by the Florida legislature to be a proper predicate upon which to base the sentencing determination. § 921.141(1). To allow the prosecutor's opinion that the death penalty is totally justified to be presented to the jury creates the risk that the death penalty will be imposed in an arbitrary and capricious manner based upon the prosecutor's political decision rather than a reasoned evaluation by the jury of the aggravating circumstances and relevant aspects of the offense and the defendant's character.

The testimony of the State Attorney presented here deprived petitioner of his right to due process. The State Attorney's testimony that there were four aggravating circumstances detailed by the statute and no mitigating circumstances clearly suggested to the jury that they could forego their duty to determine the aggravating and mitigating circumstances because the State Attorney had already done it for them. The prejudicial effect of such testimony is unquestionable. Most critically, there was no substantial reason to assume that the State Attorney's assessment of the aggravating and mitigating circumstances was accurate or reliable. Similarly, there was no basis upon which to assume the accuracy or reliability of the State Attorney's opinion that

petitioner was the leader and dominated Brown in the criminal episode. Since the State Attorney's opinion in this regard was not based upon personal knowledge, but rather on unknown hearsay information, petitioner had no opportunity to deny or rebut this information.

As a whole, the State Attorney's testimony informed the jury that the disparate treatment of petitioner and Brown was justified. Rather than present facts concerning Brown's character and his involvement in the offense from which the jury could make their own determination concerning this issue, the state sought to establish the justification for the disparate treatment through the testimony of the State Attorney that in his opinion the disparate treatment was justified and that his decision exercising his prosecutorial discretion was correct. Such testimony can hardly be characterized as accurate or reliable. The time-honored means by which the truth and accuracy of testimony are tested is cross-examination. Davis v. Alaska, 415 U.S. 308 (1974); Chambers v. Mississippi, 410 U.S. 284 (1973). See also, Ohio v. Roberts, 448 U.S. 56 (1980). However, there is no way by which the prosecutor's decision-making process can be subjected to meaningful cross-examination.

Contrary to this Court's admonitions in Gardner, the Florida Supreme Court here has failed to give due consideration to the quality of the information upon which the sentencing decision in a capital case should be based.

B. THE TESTIMONY PRESENTED DEPRIVED PETITIONER OF HIS RIGHT TO A FAIR TRIAL GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The Supreme Court of Florida's affirmance of petitioner's death sentence violated his fundamental due process right to a fair trial on the penalty issue by approving the testimony of the State Attorney which would clearly constitute prejudicial constitutional error if presented as prosecutorial argument. As previously noted, the testimony presented consisted of the

State Attorney's personal opinion or belief as to the ultimate issue to be decided by the jury - whether aggravating circumstances existed, and if so, whether sufficient mitigating circumstances existed which outweighed the aggravating circumstances so as to justify the punishment of life imprisonment rather than death. The jury was informed that the State Attorney believed there were four aggravating circumstances and no mitigating circumstances. The testimony also conveyed to the jury that the death penalty would not have been sought against petitioner unless the State Attorney and his office, based upon their weighing of the aggravating and mitigating circumstances, were convinced that the death penalty was justified. The prejudicial effect here is even more egregious than if the same belief had been conveyed by prosecutorial argument since the State Attorney's belief was improperly presented by sworn testimony which clothed it with the aura of reliability.

Assertions by a prosecutor, based upon personal knowledge, expressing his personal opinion concerning the guilt of the accused have been repeatedly condemned. E.g. Berger v. United States, 295 U.S. 78 (1935); United States v. Gonzalez Vargas, 558 F.2d 631 (1st Cir. 1977); United States v. Benson, 487 F.2d 978 (3rd Cir. 1973); Hall v. United States, 419 F.2d 582 (5th Cir. 1969); United States v. Leon, 534 F.2d 667 (6th Cir. 1976); United States v. Splain, 545 F.2d 1131 (8th Cir. 1976); Kelly v. Stone, 514 F.2d 18 (9th Cir. 1975); Devine v. United States, 403 F.2d 93 (10th Cir. 1968), cert. denied, 394 U.S. 1003 (1969). This Court has recognized that since the prosecuting attorney has the obligation in criminal prosecutions not to win a case but rather to ensure that justice is done:

> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper

> suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

Berger v. United States, 295 U.S. at 88. A prosecutor's expression of personal opinion concerning the guilt of the accused is particularly pernicious since it presumes that the entire governmental establishment has reached a determination of the defendant's guilt before the trial and improperly implies that this determination is either binding upon the jury or should be highly persuasive to it. Egregious prosecutorial argument constitutes a denial of due process rendering the trial fundamentally unfair. Donnelly v. DeChristoforo, 416 U.S. 637 (1974); Miller v. North Carolina, 583 F.2d 701 (4th Cir. 1978); Houston v. Estelle, 569 F.2d 372 (5th Cir. 1978); Kelly v. Stone, supra; Mostade v. Engle, 507 F.Supp. 402 (N.D. Ohio 1980); Alim v. Smith, 474 F.Supp. 54 (W.D. N.Y. 1979); Brown v. Estelle, 468 F.Supp. 42 (N.D. Tex. 1978), aff'd, 591 F.2d 1207 (5th Cir. 1979).

The testimony presented here clearly violates the principles of the foregoing cases. The testimony, unambiguously and deliberately, informed the jury that the State Attorney believed the death penalty was justified because the State Attorney had determined that there were four aggravating and no mitigating circumstances. Petitioner repeatedly objected to the testimony, and the jury was not instructed that the testimony of the State Attorney expressing his personal opinions and beliefs was entitled to no weight in their deliberations. By approving such testimony, the Florida Supreme Court has totally ignored the clear impropriety of the prosecutor's prejudicial testimony presented here and has deprived petitioner of his fundamental right to a fair trial on the issue of punishment.

This Court should grant certiorari to determine the type of evidence which may be offered by the state in aggravation at a capital presentence hearing. The testimony presented

here far exceeds that which should be allowed and does not constitute the accurate and reliable sentencing information which this Court has repeatedly held to be necessary in order to determine that death is the appropriate punishment. The decision of the Florida Supreme Court totally ignores the impropriety and prejudicial effect of testimony from the State Attorney that in his opinion the death penalty was justified because he had determined that the aggravating circumstances outweighed the mitigating circumstances, which testimony deprived petitioner of a fair trial on the issue of punishment.

The issue presented here, although one seemingly of first impression, is of utmost importance because of its potential for recurrence in every capital case involving multiple defendants. The ramifications of the decision of the Florida Supreme Court are ominous. The decision invites prosecutors throughout the State of Florida, and other states as well, to testify concerning their reasons for seeking the death penalty against a particular defendant. Allowing such testimony creates the grave risk that evidence which would otherwise be inadmissible, such as evidence illegally seized or confessions unlawfully extracted by police officers or state-appointed psychiatrists, is presented to the jury indirectly as the prosecutor's justifications for seeking the death penalty. Because of this great potential for abuse and because the Florida Supreme Court has failed to assure that the fundamental principles of procedural due process are abided by in capital presentence hearings, petitioner prays that this Court grant certiorari.

QUESTION II

THE FLORIDA SUPREME COURT'S AFFIRMANCE OF THE IMPOSITION OF THE DEATH SENTENCE UPON PETITIONER VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE AN ILLEGAL AGGRAVATING CIRCUMSTANCE CONTRIBUTED TO THE DECISION TO IMPOSE THE PENALTY OF DEATH.

The Supreme Court of Florida affirmed the death penalty imposed upon petitioner although the Court found that the trial court's imposition of the death penalty rested in part upon an improper aggravating circumstance. The Court improperly determined, however, that this error was harmless.

The decision of the Supreme Court of Florida directly conflicts with that of the Fifth Circuit Court of Appeals in Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), modified, 648 F.2d 446 (5th Cir. 1981), cert. granted, 50 U.S.L.W. 3244 (U.S. Oct. 5, 1981) (No. 81-89). The Court there held that where the jury imposed the death penalty based upon three statutory aggravating circumstances, one of which was later held to be unconstitutional, the death penalty could not be upheld on appeal because "it is impossible for a reviewing court to determine satisfactorily that the verdict...was not decisively affected by an unconstitutional statutory aggravating circumstance." 631 F.2d at 406. Similarly here, it is impossible for the Supreme Court of Florida to determine that the imposition of the death penalty by the trial court was not decisively affected by consideration of an improper aggravating circumstance.

Section 921.141 requires the jury to determine whether sufficient aggravating circumstances exist to justify imposition of the death penalty, and if so, to determine whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances thereby justifying life imprisonment, rather than a sentence of death. Although the jury's recommendation is merely advisory, the Florida Supreme Court has held that a jury's recommendation of life may be overruled by the trial judge only when "the facts suggesting a sentence of

death...[are] so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d 908,910 (Fla. 1975). Because the jury is not required to enter specific findings of facts relating to the aggravating or mitigating circumstances found, a jury's recommendation of death merely indicates that the jury found sufficient aggravating circumstances to justify the death penalty and that the mitigating circumstances were insufficient to outweigh the aggravating circumstances.

The jury here was improperly instructed that it could consider as aggravating circumstances both the fact that the capital felony was committed for pecuniary gain and the fact that the capital felony was committed during a robbery. Because the Florida Supreme Court cannot determine that the jury's verdict was not decisively affected by consideration of an improper statutory aggravating circumstance, the death sentence should be set aside and the cause remanded for another sentencing hearing, as in Stephens v. Zant, supra. This is especially true here since the jury's penalty verdict was a general verdict, and, unlike the jury's verdict in Stephens v. Zant, supra, was uncertain in that the jury failed to make specific findings as to which aggravating circumstances were established beyond a reasonable doubt.

The Florida Supreme Court's affirmance here also violates the principle enunciated in Sandstrom v. Montana, 442 U.S. 510 (1979); Bachellar v. Maryland, 397 U.S. 564 (1970); Street v. New York, 394 U.S. 576 (1969); Yates v. United States, 354 U.S. 298 (1957); and Stromberg v. California, 283 U.S. 359 (1931), that a criminal conviction must be reversed if the jury could have based its general verdict on an unconstitutional statutory ground, even though there were other valid statutory grounds which the jury in fact may have employed. Although the improper instruction here relates to sentencing, rather than the conviction itself, the

foregoing principle should be equally applicable since the capital sentencing procedure so closely resembles a trial. Cf. Bullington v. Missouri, __U.S.__, 68 L.Ed.2d 270, 101 S.Ct. 1852 (1981). Further, the erroneous instruction may well have deprived petitioner of a life recommendation by the jury, which could be overridden only under very limited circumstances. Tedder, supra.

It is clear that the trial court here improperly considered the fact that the capital felony was committed for pecuniary gain and the fact that the capital felony was committed during a robbery as two aggravating circumstances. Although death is presumed where there are aggravating circumstances counterbalanced by no mitigating circumstances, State v. Dixon, 283 So.2d 1,9 (Fla. 1973), the death penalty is not mandated in such a situation. See Demps v. State, 395 So.2d 501,505 (Fla. 1981),cert.denied,50 U.S.L.W. 3279 (U.S. Oct. 13, 1981). Since the Florida Supreme Court does not impose a sentence of death and does not reweigh or reevaluate the evidence adduced to establish aggravating or mitigating circumstances, Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981),cert.denied,50 U.S.L.W. 3349 (U.S. Nov. 2, 1981), the Florida Supreme Court cannot, consistent with these principles, determine upon appellate review that the trial judge would have imposed the sentence of death absent his consideration of an improper aggravating circumstance. This assumption by the Supreme Court of Florida is particularly suspect where, as here, the trial judge's sentencing order merely negates the finding of any statutory mitigating circumstances. It is quite possible that the trial judge found, as allowed by Lockett v. Ohio, 438 U.S. 586 (1978), a non-statutory mitigating circumstance based upon the psychological testimony presented at the sentencing hearing that petitioner suffered a mild pattern of cerebral disfunctioning and was immature with poor impulse control which was

exacerbated by the use of intoxicants. Thus, the trial judge's weighing and balancing of the aggravating and mitigating circumstances may well have been different had he not considered the improper aggravating circumstance. To allow the Supreme Court of Florida to engage in the speculation that the trial judge's conclusion would have been no different absent his consideration of an improper aggravating circumstance significantly undermines the reliability of the sentencing determination and is incompatible with the Eighth and Fourteenth Amendments.

The issue of whether the sentencer's reliance upon improper aggravating circumstances in imposing a death sentence violates the Eighth and Fourteenth Amendments is a recurring one not only in Florida, but in other jurisdictions as well. E.g. Bufford v. State, 382 So.2d 1162 (Ala.Crim.App. 1980),cert.denied,382 So.2d 1175 (Ala. 1980); State v. Steelman, 612 P.2d 475 (Ariz. 1980),cert.denied,449 U.S. 913 (1980); Green v. State, 272 S.E.2d 475 (Ga. 1980), cert.denied, 450 U.S. 936 (1981); State v. Monroe, 397 So.2d 1258 (La. 1981); State v. Peery, 261 N.W.2d 95 (Neb. 1977), cert.denied, 439 U.S. 882 (1978); State v. Cherry, 257 S.E.2d 551 (N.C. 1979), cert.denied,446 U.S. 941 (1980); State v. Moore, 614 S.W.2d 348 (Tenn. 1981). Because the issue is a recurring one and because the decisions among the state and federal courts are conflicting, it is of utmost importance that this Court grant certiorari in order to determine the proper scope of appellate review in capital sentencing procedures where the sentencer has relied upon improper considerations in imposing a sentence of death.

QUESTION III

THE FLORIDA SUPREME COURT'S AFFIRMANCE OF PETITIONER'S DEATH SENTENCE VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE COURT FAILED TO DETERMINE WHETHER EX PARTE INFORMATION RELATING TO PETITIONER OR OTHER DEATH SENTENCE DEFENDANTS HAD BEEN RECEIVED AND REVIEWED BY THE COURT DURING ITS APPELLATE REVIEW PROCESS.

In his petitions for rehearing filed with the Florida Supreme Court, petitioner's counsel averred that he had observed in the Court's file a copy of a letter from the Court to the Department of Offender Rehabilitation requesting, ex parte, a copy of the latest psychological report pertaining to petitioner. Petitioner requested that the Court conduct a hearing to determine whether a psychological screening report pertaining to petitioner was received by the Court and whether such a report was read and considered by any members of the Court. (Appendix B-4-6; J-3-5). The Florida Supreme Court, sub silentio, denied petitioner's request apparently based upon its decision in Brown v. Wainwright, supra. Petitioner further asserted that receipt of such reports relating to other death-sentenced appellants would render Florida's capital sentencing procedure unconstitutional.

The Florida Supreme Court's ex parte consideration of non-record psychological reports relating to petitioner violates Gardner v. Florida, supra. There the Court invalidated a death sentence which had been imposed by the trial court based in part upon a confidential portion of a presentence report which had not been disclosed to the defendant or his counsel. The considerations applicable there - the "vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion", Id. at 358; the risk that undisclosed information may be erroneous or misinterpreted, Id. at 359; and the essential role of counsel and the adversary system to the process of evaluating facts upon which a sentencing decision may be based, Id. at 360 - apply with no less force to undisclosed factual information garnered by an appellate court.

Florida's appellate review system has previously been described as one which reposes in the Florida Supreme Court the "separate responsibility to determine independently whether the imposition of the ultimate penalty is warranted", Songer v. State, 322 So.2d 481, 484 (Fla. 1975), vacated on other grounds, 430 U.S. 952 (1977), based upon the Court's reweighing of the evidence of the aggravating and mitigating circumstances, Proffitt v. Florida, 428 U.S. 242 (1976), and as one in which "a sentence of death cannot lawfully be carried out unless at least four members of [the Florida Supreme] Court agree that it is warranted, notwithstanding that the sentencing jury advised and the trial judge imposed that sentence." Vasil v. State, 374 So.2d 465, 471 (Fla. 1979). Brown v. Wainwright, supra, described the court's appellate function as two-fold: first, to determine that the death penalty was imposed with procedural regularity, and second, to compare the case under review with prior capital cases to ensure relative proportionality among death sentences which have been approved statewide. It is readily apparent that consideration of a non-record psychological report pertaining to petitioner by the Florida Supreme Court may affect both aspects of the court's appellate function. Thus, here, as in Gardner, affirmance of petitioner's death sentence based upon confidential information which was not disclosed to petitioner or his counsel violates the Due Process Clause of the Fourteenth Amendment.

Receipt by the Florida Supreme Court of non-record psychological reports infringed upon petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel, a right applicable on appeal as well as at trial. See, Anders v. California, 386 U.S. 738 (1967). As noted in Gardner, "sentencing is a critical stage of the criminal proceeding at which [the defendant] is entitled to the effective assistance of counsel." Id. at 358. Receipt of such non-record evaluative information on appeal, without notice to petitioner or his counsel, deprived counsel of the opportunity to deny, explain or place in context the information and rests upon the:

> erroneous premise that the participation of counsel is superfluous to the process of evaluating the relevance and significance of aggravating and mitigating facts. Our belief that debate between adversaries is often essential to the truth-seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases.
>
> Id. at 360

By depriving petitioner's counsel this opportunity to comment on undisclosed facts related to petitioner, the Florida Supreme Court has impeded the effectiveness of petitioner's appellate counsel.

The Florida Supreme Court's consideration of non-record psychological reports additionally deprived petitioner of his Fifth Amendment privilege against self-incrimination, his Sixth Amendment right to confrontation and to counsel and his Eighth Amendment right to accurate and reliable sentencing information in the determination that death is the appropriate punishment. "A procedure for selecting people for the death penalty which permits consideration of such secret information relevant to the 'character and record of the individual offender,' [Woodson v. North Carolina; supra at 304], fails to meet the 'need for reliability in the determination that death is the appropriate punishment' which the Court indicated was required in Woodson, supra, at 305" Gardner, supra at 364 (White, J., concurring in judgment). Untested by the adversary process, "[t]he risk that some of the information...may be erroneous, or may be misinterpreted,...is manifest." Gardner, at 359. Since the psychological report may well consist of inadmissible, unreliable hearsay, consideration of the report without the opportunity of cross-examination deprived petitioner of his confrontation rights. See Ohio v. Roberts, supra. Consideration of a psychological report pertaining to petitioner may also contravene this Court's decision in Estelle v. Smith, ___U.S.___ (68 L.Ed.2d 359) (1981).

Receipt by the Court of such reports pertaining to other death-sentenced appellants violates petitioner's Eighth

Amendment protection against the arbitrary and capricious infliction of the death penalty. In upholding the facial validity of Florida's death penalty statute, this Court indicated that appellate review by the Florida Supreme Court would assure consistency, fairness, and rationality in the operation of the statute since the Court reviews each death sentence to ensure that similar results are reached in similar cases. Proffitt v. Florida, supra. This proportionality review is rendered meaningless and the appellate process skewed if the sentences of other capital defendants with which petitioner's sentence was compared are upheld or vacated on the basis of undisclosed factual information.

This Court should grant certiorari to determine whether the Florida Supreme Court's receipt and consideration of non-record evaluative materials relating to petitioner or other death-sentenced appellants is consistent with the constitutional requirements discussed above.

CONCLUSION

WHEREFORE, the petition for writ of certiorari should be granted.

Respectfully submitted,

P. DOUGLAS BRINKMEYER
Assistant Public Defender
Second Judicial Circuit
P. O. Box 671
Tallahassee, Florida 32302
Phone: 904/488-2458

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari to The Supreme Court of Florida has been furnished by U.S. mail to the Honorable Alexander L. Stevas, Clerk of the United States Supreme Court, First and Maryland Avenue, Northeast, Washington, D. C. 20543; Mr. Charles Dwight Messer, #025822, Florida State Prison, Post Office Box 747, Starke, Florida 32091; and by hand-delivery to the Honorable Sid White, Clerk of the Supreme Court of Florida, Supreme Court Building, Tallahassee,Florida; and the Honorable Jim Smith, Attorney General, The Capitol, Tallahassee, Florida; on this 23 day of December, 1981.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER

NO 81 5944

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

RECEIVED
DEC 23 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CHARLES DWIGHT MESSER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

APPENDIX

P. DOUGLAS BRINKMEYER
ASSISTANT PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
P. O. BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

(MEMBER OF THE BAR OF THIS COURT)

APPENDIX

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tences imposed on Archie and the defendant, we find that they are justified under the circumstances. In contrast to the active role played by defendant throughout the robberies and murders, Archie served only as the wheelman whose role was limited to driving the defendant and the two other intruders to Stocker's residence. He met with them again at the motel room after the entire episode was over. The defendant's moral and legal culpability was, in our opinion, much greater than Archie's. Hence, we cannot conclude based on our review of this case and other cases in which the death sentence was imposed, that the defendant has been treated differently upon substantially similar circumstances. We hold that the death sentence has been imposed on the defendant consistent with the equal administration of justice.

For the foregoing reasons, we affirm the conviction of the defendant on all counts as charged and affirm the imposition of the death sentence.

It is so ordered.

SUNDBERG, C. J., and BOYD, OVERTON, ENGLAND, ALDERMAN and McDONALD, JJ., concur.

ADKINS, J., concurs in result only.

Charles Dwight MESSER, Appellant,

v.

STATE of Florida, Appellee.

No. 49780.

Supreme Court of Florida.

June 4, 1981.

Rehearing Denied Oct. 1, 1981.

Defendant's conviction for first-degree murder and robbery was affirmed by Supreme Court, 330 So.2d 137, but the sentence of death was vacated and remanded for a new sentencing proceeding. On appeal after this hearing was held, the Supreme Court, 384 So.2d 644, remanded for another hearing. On remand, the Circuit Court, Santa Rosa County, Clyde B. Wells, J., imposed the death sentence, and defendant appealed. The Supreme Court held that the trial court's findings supported the sentence of death.

Affirmed.

1. Criminal Law ⇐986.5

Evidence in sentencing hearing supported finding that sentence of death for first-degree murder was imposed without consideration of information not disclosed to defendant prior to sentencing.

2. Criminal Law ⇐986.6(1)

In sentencing hearing following conviction for first-degree murder, it was within discretion of trial court to allow State to explain to jury, through testimony of state attorney, reasons for seemingly disparate treatment by state attorney between defendant and accomplice in accepting guilty plea to second-degree murder from accomplice and in prosecuting defendant for first-degree murder.

3. Criminal Law ⇐986.2(4)

In sentencing hearing following conviction for first-degree murder, defendant's manslaughter conviction in another state was admissible as relevant to statutory aggravating circumstances. West's F.S.A. § 921.141.

4. Criminal Law ⇐1177

In sentencing hearing following conviction for first-degree murder in which death penalty was imposed, error in trial court's consideration of circumstances of crime in making two findings, that murder was committed in course of robbery and that it was committed for pecuniary gain, which both related to same aspect of crime, was harmless.

5. Homicide ⇐354

In prosecution for first-degree murder, trial court's findings made after sentencing trial supported sentence of death.

Theodore E. Mack, Asst. Public Defender, Tallahassee, for appellant.

Jim Smith, Atty. Gen., and Wallace E. Allbritton, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

This cause is before the Court on appeal of a sentence of death imposed for the capital felony of murder in the first degree. This Court previously affirmed the conviction for first-degree murder and robbery, but vacated the sentence of death and remanded for a new sentencing proceeding before a jury. *Messer v. State*, 330 So.2d 137 (Fla.1976). A new jury was empaneled and a second sentencing proceeding was held. The trial court again sentenced appellant to death and this appeal followed.

On March 22, 1977, the Supreme Court of the United States decided *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), holding that due process is denied when the imposition of a sentence of death is based, even if only in part, on information which the defendant has no opportunity to deny or explain. Subsequently, on June 16, 1977, this Court entered an order in the instant case directing the sentencing judge to state whether he imposed the death sentence in consideration of any information not known to the appellant.

On September 26, 1977, the trial court filed a response. This Court's consideration of the appeal then continued until April 26, 1979, when we issued an opinion announcing our decision to affirm the sentence of death. *Messer v. State*, No. 49780 (Fla., April 26, 1979) (opinion withdrawn). On motion of the appellant for rehearing, however, based on a discrepancy between the trial court's response to our *Gardner* order and other documents of record, we withdrew the opinion of April 26, 1979, and, on November 8, 1979, remanded for a *hearing* on the question of a possible violation of the *Gardner* principle. *Messer v. State*, 384 So.2d 644 (Fla.1979).

The trial court held a hearing for the purpose of inquiring whether the sentence of death was imposed in consideration of any information not disclosed to appellant or any reports not furnished to him prior to sentencing. A lawyer from the office of the Public Defender for the First Judicial Circuit, which office had previously represented the appellant at trial, was present, but had moved to withdraw from representation due to conflict of interest. A lawyer from the office of the Public Defender for the Second Judicial Circuit, who was serving as appointed appellate counsel, notified of the hearing, but informed the court of his view that he was without authority to represent the appellant at trial-level proceedings or outside the second circuit. The judge then ruled that there was no need for appellant to be represented at the hearing and proceeded with the inquiry.

When the findings were received by this Court, we held that the proceeding was deficient in that appellant was entitled to be represented by counsel at the hearing. On June 5, 1980, we remanded for another hearing to inquire whether the sentence of death was imposed by a judge who considered information not disclosed or reports not furnished to appellant, and directed that his appellate counsel represent him at such hearing. *Messer v. State*, 384 So.2d at 645 (Fla.1980).

Another hearing on the question of a *Gardner* violation was held by the trial court, and we are in receipt of the transcript and the judge's written findings. The findings are reported to us as follows:

> THIS CAUSE is before this court on remand from the Supreme Court of the State of Florida, opinion filed June 5, 1980, 384 So.2d 644.
>
> The purpose of remand was for this court to conduct a further hearing to determine whether the sentence of death of the appellant was imposed in consideration of any information not disclosed to

the defendant or not furnished to him prior to sentencing.

At the hearing, appellant was personally present with counsel and the State of Florida was represented by the State Attorney's Office of the First Judicial Circuit, all proceedings were duly reported. The trial judge in the case recused himself because he had been subpoened [*sic*] by appellant's attorney as a material witness.

The hearing was heard by the undersigned circuit judge. The State of Florida called two witnesses, M. J. Livings, who is employed by the Florida Probation and Parole Office. He testified he had conducted a postsentence investigation on the defendant. The testimony reveals that he never furnished a copy of the postsentence investigation to the presiding judge and that such postsentence investigation was conducted after the first hearing but prior to the second sentencing hearing. That there were 5 copies, one went to the Executive Clemency Committee and he retained four copies; that he had never discussed the report with Judge Wells and he put a copy of the report in the file but it was not during any sentencing proceeding. He testified at the time of the original sentencing there was no presentence investigation or postsentence investigation or reports. Honorable Clyde Wells, Circuit Judge, First Judicial Circuit, was called as a witness and testified that he sentenced the defendant on two occasions; that he did not order a presentence investigation and that he never saw any reports prior to sentencing or talked to any probation officer and he had no other information prior to sentencing. He further testified that the Supreme Court requested under *State v. Gardner* rule, if he had any other information at the first sentencing. He originally replied there was a presentence investigation, but the mandate had come to him in Walton County his residence and he had replied without checking and had made an erroneous statement that he had a presentence investigation when in fact he did not. He testified he had not had a presentence investigation and he did not have the benefit of any other information; he never requested a presentence investigation because there was a tremendous amount of information involved in the trial of the case and he had found in many instances presentence investigations sometimes contain information that was not available to defendants. His testimony indicated if he had used a report it would have been made a part of the record. He testified that the postsentence was done before the second sentencing but he still has not used the postsentencing report.

The Court points out the postsentence referred to is in the court file and the testimony was it was conducted for the Executive Clemency Board or Commission and not at the behest of or for the court.

Based on the above, it is the opinion of this court and this court finds that the sentence of death was imposed without consideration of any information not disclosed to the appellant or reports not furnished to him prior to the sentencing.

Respectfully submitted this 2nd day of October, 1980.

[1] Having reviewed the transcript of the hearing, we find that the court's findings are amply supported by the evidence. We also conclude that the court's report has adequately disposed of the discrepancy we noted in our order on rehearing, dated November 8, 1979. *Messer v. State*, 384 So.2d at 644.

Having disposed of the *Gardner* problem, we are now in position to review the second sentencing proceeding and consider the propriety of the sentence of death.

The facts as stated in our earlier opinion, and based on Messer's confession, were that appellant and Ronnie Brown stopped at an interstate highway rest area where they found Henry Fowler sleeping in a car. They entered the car and robbed him of his valuables, including a watch and $120.00. Then they drove the car, with the victim as

their captive, to several locations. Ultimately Brown struck the victim, and appellant shot him in the head. *Messer v. State*, 330 So.2d 137, 139 (Fla.1976).

There were two procedural defects this Court found in the initial sentencing proceeding.

First, although there is evidence in the record of the plea-bargained second degree murder sentence received by appellant's accomplice Brown, appellant was not permitted, during the sentencing portion of the trial, to submit this evidence to the jury. We believe the jury was entitled to know that the co-defendant, Ronnie Brown, negotiated a plea of guilty to second degree murder and was sentenced to 30 years imprisonment. See *Slater v. State*, 316 So.2d 539 (Fla.1975). Although the *Slater* case, *supra*, involved evidence that the "trigger man" was permitted to negotiate a plea for a sentence of life imprisonment, under the facts of this particular case we believe the reasoning of *Slater* applies with equal force. It was there stated, "Defendants should not be treated differently upon the same or similar facts." In the instant case, although the appellant did fire the shot into the head of the victim, this shooting occurred after Brown took a wallet containing $120 and a watch from the victim, then struck him in the back of the head. There is little to separate out the joint conduct of the co-defendants which culminated in the death of the decedent. The sentence afforded to Brown certainly is not determinative of the sentence which appellant should receive; however, the jury should have had the benefit of the consequences suffered by the accomplice in arriving at its recommendation of the sentence to be visited upon the appellant.

Additionally, we believe counsel for the defendant was effectively deprived of establishing an important mitigating circumstance when he was not afforded the opportunity to present psychiatric testimony to the jury during the sentencing portion of the proceedings. Subsection 921.141(6)(b), Florida Statutes, provides as a mitigating circumstance that "[t]he capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance." Counsel for the appellant represented to the court that, if given the opportunity, he would come forward with evidence establishing such condition. The expression by the trial court that the verdict of the jury is merely advisory and that he could consider psychiatric reports at the time he performed the actual sentencing, in our opinion, violates the legislative intent which can be gleaned from Section 921.141, Florida Statutes. It is clear that the Legislature in the enactment of Section 921.141, Florida Statutes, sought to devise a scheme of checks and balances in which the input of the jury serves as ar integral part. The validity of the jury's recommendation is directly related to the information it receives to form a foundation for such recommendation. Subsection 921.141(1), Florida Statutes, provides in part:

> "... In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) [sic] and (7) [sic] [of this section]. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements...."

The quoted language indicates that the circuit judge should exercise the broadest latitude in admitting evidence during the sentencing portion of the jury's deliberations.

Messer v. State, 330 So.2d at 141–42.

On remand, a special jury was empaneled for the purpose of making a sentencing recommendation. At a pre-trial conference, the defense moved that the jury be apprised of the facts and circumstances of the crime by having read to them the statement of

facts found in this Court's opinion filed when the previous appeal was decided. The state opposed the motion, arguing that in order for the jury to be fully apprised of the circumstances, the state should be permitted to present the evidence of the crime substantially as it had been presented at the first trial. The judge stated that he wished to avoid holding the entire trial over again, but that he also felt that to read a statement of facts from this Court's opinion would be inadequate. Accordingly, the state was allowed to present evidence relating directly to the facts of the crime.

According to the testimony presented, the victim's body was found by two hunters on the morning of November 27, 1973. The body was dressed in a pull-over karate jacket and green trousers. A pathologist testified that the cause of death was a bullet wound to the brain. There was also a laceration on the back of the head indicating that the victim had been struck with a metal instrument of some kind. An officer who inspected the body at the scene testified that the cut was vertical. The pathologist who performed the autopsy testified that the laceration was horizontal and was about two inches long. The cut, according to the pathologist's testimony, went through the scalp and penetrated the muscle tissues under the scalp, but did not penetrate, nor did it fracture, the skull. This cut could have been inflicted by striking the victim with a pistol. The only part of a pistol that could have caused such a cut is the sight blade. To hold a pistol in such a way as to achieve the leverage to make such a cut, the expert said, would involve considerable awkwardness. The laceration could have been inflicted with a tire tool, as claimed in appellant's confession, but a blow with a tire tool would more likely have fractured the skull.

Witness Richard Knapp testified that he last saw his friend Henry Fowler on November 26, 1973, at Knapp's home in Semmes, Alabama, near Mobile. They had travelled together to Louisiana for the Thanksgiving holidays. After leaving Knapp at his home, Fowler was to drive on to Dothan. Knapp said that Fowler had a little over $100 on his person when he left. His car trunk contained a spare tire and some wrenches. Fowler was wearing a white karate jacket. When police recovered Fowler's car, the spare tire and tools were gone.

The state introduced in evidence a .32 caliber pistol. Lewis Hancock testified that he owns a small grocery store in Esto, Florida, about twelve miles north of Bonifay. One day in late 1973, Messer came into the store saying that he had an emergency call and had to go to Birmingham. He wanted to borrow forty or forty-five dollars and to leave as security a .32 caliber pistol resembling the one in evidence. Hancock loaned him the money, but Messer never came back for the gun. Hancock later turned the weapon over to an officer of the Florida Department of Criminal Law Enforcement.

Shawn Ingram testified that he worked as a sales clerk at the Western Auto Store in Bonifay. He had known Ronnie Brown since grammar school. On November 24, 1973, he sold a pistol to Ronnie Brown. The state presented, and Ingram identified, a written record of the firearm sale. The serial number matched the one on the pistol in evidence. Under the law regulating sales of firearms, Ingram testified, he was required to ask Brown certain questions, including whether he had ever been convicted of a crime. Ronnie Brown answered this question in the negative and Ingram said he had no reason to disbelieve him. Ingram testified further that the appellant Messer was present when Brown bought the gun.

The state and the defense stipulated that the bullet removed from the body of Henry Fowler was fired from the gun purchased by Ronnie Brown and introduced in evidence.

Curtis Golden, State Attorney for the First Judicial Circuit, was called as a witness for the state. He testified that on January 17, 1974, he went to Anniston, Alabama to interview Messer. Messer's original stated reason for consenting to the interview was to clear his conscience because he had knowledge of a murder that had

taken place along the interstate highway in Florida. He asked for immunity from prosecution. Golden refused, telling Messer he could not consider that until he knew what the information was.

Messer then indicated he would tell about the murder anyway. Golden advised him of his constitutional rights and proceeded with the interview. Golden asked Messer about his education level and Messer claimed he had completed two years of junior college. Golden's subsequent investigation did not include any attempt to verify this information. The initial interview was recorded on tape.

In his first statement, Messer said that he, Ronnie Brown of Bonifay, and one Ray King of Bonifay were all together when King killed Fowler. Golden testified that he was dissatisfied with this statement because of certain inconsistencies between the factual details of it and certain facts already revealed by the investigation. For example, Messer said King robbed Fowler of some $8,000 in cash of small denominations, an amount impossible to carry in the pockets of a karate jacket. So, the next day, he interviewed Messer again. Messer changed his story in certain particulars, but still maintained that the murder was committed by the man named Ray King.

Lt. Jesse Cobb, a Santa Rosa County sheriff's investigator, testified that on January 23, 1974, he was present along with Santa Rosa County Sheriff Enfinger, Sheriff Snead of Anniston, Alabama, and Mr. Ronnie Cornelius of the Florida Department of Criminal Law Enforcement, when Messer led them to the scene of the crime. This took place after Messer had already given two statements in which he said that Ray King had murdered Fowler. Messer also showed the officers the highway rest area where Fowler's car was left after the murder.

Florida state crime investigator Ronnie Cornelius testified that he participated in the investigation and went to Anniston with Mr. Golden and Lt. Cobb on January 17, 1974. On January 21, 1974, Cornelius telephoned Ronnie Brown, who was in Arlington, Texas. Cornelius told Brown that he was investigating the sabotage of county equipment in Holmes County. Cornelius had reason to know that Brown would have some awareness of the existence of such an investigation. He told Brown that he needed to talk to him in order to get the investigation "cleared up." He asked Brown whether, if the State of Florida would pay his air fare, he would be willing to return to Florida for questioning.

Brown came to Florida and was interviewed on the 21st and 22nd of January, 1974. Therefore when the investigators commenced their third interview with Messer on January 23, they had the advantage of what they had learned from Brown. A fourth and final statement was taken from Messer on the afternoon of the 23rd, following which he was placed under arrest for first-degree murder and robbery. The tape-recorded statement was played for the jury.

As was stated in this Court's opinion of March 31, 1976, Messer's final statement was that

> he and Brown had been traveling on the Interstate Highway, he had been drinking liquor and beer, and they stopped at a rest area to look for toilet facilities. When they stopped, they decided to rob the victim, who was asleep in a parked car in the rest area. The pair entered the victim's car, held him up, drove him to several locations; ultimately Brown struck the victim, and appellant shot him once in the head. Brown had previously taken the victim's wallet and watch, and the pair divided $120.00 and disposed of the victim's wallet, personal effects, and car tag.

Messer v. State, 330 So.2d at 139. At the second sentencing hearing, however, the state's witnesses testified that while Brown admitted participating in the robbery and murder, in none of his statements did he admit any participation in the actual perpetration of physical violence against Henry Fowler.

Over defense objection, the court allowed the state to elicit from Curtis Golden the

reasons underlying his exercise of prosecutorial discretion. It was his decision to seek the death penalty against Messer while accepting Brown's plea of guilty to second-degree murder. This Court held that Messer should have been allowed to apprise the jury of this disparate treatment. On remand, the court below held that the state was entitled to present the reasons underlying the exercise of discretion that brought about this result.

Mr. Golden testified that he learned that Messer and Brown met when Messer was in jail in Bonifay, where Brown's brother-in-law worked as a juvenile counselor. Golden took into consideration that Brown had not been involved in any criminal activity until he met Messer. Golden concluded that Messer was the leader, Brown the follower in the criminal episode that led to Henry Fowler's death.

Golden testified that he believed both men participated in the abduction and robbery of Fowler, and that both were therefore equally guilty of murder in the first degree. He believed that he could have secured convictions of both men for such crime. He believed, however, that because of Brown's lower intelligence and education, he would have been able to establish mitigating circumstances, under the capital felony sentencing law, based on his subordinate role and domination by Messer. Golden believed that on this basis Brown would likely be able to secure a jury recommendation of, and sentence to, life imprisonment. The maximum penalty for second-degree murder is life imprisonment, Golden reasoned, so he decided to allow Brown to plead guilty to second-degree murder in order to spare the state the expense of a trial. No particular sentence or sentence recommendation was promised Brown in exchange for his plea. Golden said he expected Brown to be sentenced to life imprisonment.

Brown actually received a sentence of thirty years imprisonment, and the jury was apprised of this fact. The jury was informed as well that when one convicted of first-degree murder is sentenced to life imprisonment, he is not eligible to seek parole for twenty-five years, while the parole eligibility of a person sentenced to thirty years is profoundly different.

Golden testified further that with regard to Messer's case, he foresaw that the state would be able to establish several aggravating circumstances, and believed there were no mitigating circumstances. He also considered the fact that Brown admitted guilt before Messer did; Brown's cooperation and statements assisted in the solving of the crime, while Messer attempted to implicate a third, totally innocent man.

Following the state attorney's testimony about the reasons underlying his exercise of prosecutorial discretion, defense counsel moved that the court direct a verdict recommending life, and impose a life sentence. The defense based the motion on the ground that the state attorney's testimony demonstrated that he had exercised his discretion arbitrarily. A proper application of the death penalty statute, defense counsel argued, requires consistency, not arbitrary distinctions in determining the relative culpability of joint perpetrators.

The sentencing judge asked defense counsel to explain why the state attorney's exercise of discretion with regard to the case against Brown, whether it was proper or improper, had anything at all to do with the question of what sentence should be imposed upon Messer. After further argument, the court denied the motion.

The state presented the testimony of Dr. Anthony Semon, clinical psychologist. Dr. Semon examined Messer in December, 1974. He concluded that Messer was of average intelligence but that there were some indications of mental problems. His examination led him to the "hypothesis" that there may have been some impairment of the inhibitory functions of Messer's brain, but since he performed only a cursory examination rather than a "complete neurological work-up," this remained only a "hypothesis."

Dr. Semon testified that he also examined Brown. His examination of Brown was more detailed and included intelligence,

neuropsychological, and personality tests. The doctor concluded that Brown's intelligence was substantially below normal and that he suffered from some possible brain damage. As to personality, Dr. Semon characterized Brown as "a follower," a person who accommodates himself to the demands of others. Based on these conclusions, Dr. Semon gave his opinion that during the criminal episode Brown's capacity to understand the character of his actions was probably impaired and he was probably acting under the domination of Messer.

The state introduced a certified record from the State of Alabama showing that on October 3, 1974, Messer was convicted of manslaughter pursuant to a plea of guilty, based upon a crime that occurred on January 14, 1974.

The defense presented the testimony of Dr. Elizabeth McMahon, clinical psychologist. She testified that on May 15, 1976, she examined Messer for eight and one-half hours. She administered intelligence, neuropsychological, and behavioral tests. She had access to previous evaluations performed on Messer in 1974, including the preliminary conclusion or "hypothesis" of Dr. Semon concerning possible problems of brain functioning.

Dr. McMahon concluded that Messer evidenced a very mild pattern of cerebral dysfunctioning. What she found was indicative of a mild form of epilepsy, which, she said, is often caused by repeated trauma to the head. Dr. McMahon pointed out that this condition is not the *grand mal* form of epilepsy that is associated with severe seizures, but involves mild, "subclinical" seizures which cause a reduction in the efficiency of cerebral functioning.

The psychologist testified further that she concluded that Messer was an emotionally stunted person. That is, he has weak emotional controls that break down under stress. He has limited capacity to control his impulses. Dr. McMahon characterized Messer's personality type as "passive-reactive," and explained that this means he tends to react to, rather than act upon, his environment.

On cross-examination by the state, Dr. McMahon stated that Messer's problems of mental dysfunction are mild, not extreme.

On rebuttal the state presented the testimony of Dr. Theodore Marshall, a psychiatrist. He testified that he examined Messer for ninety-five minutes on December 13, 1974. The examination was performed pursuant to court order for the purpose of determining Messer's mental condition. Dr. Marshall testified that he found Messer to be coherent and that he manifested no dissociation of thinking.

After hearing the arguments of counsel, the jury deliberated and returned a verdict recommending that the court sentence Messer to death. The sentencing judge made the following findings:

FINDINGS OF FACT

Pursuant to Section 921.141(3), the Court makes the following findings of fact which constitutes the justification for the imposition of the sentence herein administered:

a. That the crime of First Degree Murder was committed while the Defendant was in the process of committing the crime of robbery (for which he has likewise been convicted).

b. That the crime was committed for pecuniary gain in that the Deceased was robbed of $120.00, and other property at the time of the commission of this offense.

c. That the murder was committed in a manner the Court finds to be especially atrocious and cruel in that the victim was taken in his automobile at gun point to two different locations, was required to get into the trunk of his automobile where he was transported, repeatedly told the Defendant he had no intentions of resisting, and finally was hit over the head and shot and left to die in the woods.

d. That by the Defendant's own statement his last 15 years were devoted to criminal behavior, but specifically finds that the Defendant was previously convicted of the crime of manslaughter.

e. That the Defendant was the leader of the two co-defendants, and that the sentence received by the Defendant, Brown, (which was not passed by this Court) is not a justification for this Defendant receiving a lesser sentence.

f. The Court has reviewed those mitigating circumstances contained in Section 921.141(6)(a) through (g), and finds that none of those mitigating circumstances are present. In making this finding, the Court has considered the testimony of the two clinical psychologists and the psychiatrist who testified, none of whom diagnosed the Defendant to have been suffering any extreme mental or emotional disturbance at the time of the commission of the offense.

Based on the above findings, the Court concludes that sufficient aggravating circumstances exist to require the sentence of death in the electric chair, and that no mitigating circumstances exist which would allow this Court to reduce that sentence to life imprisonment.

Appellant contends that the court erred in allowing State Attorney Golden to testify concerning his opinion of the relative culpability and characteristics of Messer and Brown; that the Alabama manslaughter conviction should not have been admitted into evidence; that the court erred in its evaluation of the aggravating and mitigating circumstances; and that application of the death penalty to Messer is unconstitutional because it is the result of arbitrary prosecutorial discretion.

[2] In his initial appeal of his conviction and sentence, Messer successfully maintained that he should have been allowed to tell the jury that Brown had been allowed to plead guilty to second-degree murder and had received a thirty-year sentence. *Messer v. State*, 330 So.2d 137 (Fla.1976). We hold that it was within the discretion of the trial court to allow the state to explain to the jury, through the testimony of the state attorney, the reasons for the seemingly disparate treatment.

[3] The Alabama manslaughter conviction was admissible as relevant to a statutory aggravating circumstances. *See Elledge v. State*, 346 So.2d 998 (Fla.1977).

[4] The only error we find in the judge's consideration of the circumstances of the crime is that the finding that the murder was committed in the course of a robbery and the finding that it was committed for pecuniary gain both relate to the same aspect of the crime. *Provence v. State*, 337 So.2d 783 (Fla.1976), *cert. denied*, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). This error, however, was harmless. *Hargrave v. State*, 366 So.2d 1 (Fla.1978), *cert. denied*, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979).

Appellant's contention that the exercise of prosecutorial discretion renders the capital felony sentencing law unconstitutional as applied to his case is without merit. *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

[5] Having provided careful review of the sentencing trial and the court's findings, we affirm the sentence of death.

It is so ordered.

SUNDBERG, C. J., and ADKINS, BOYD, OVERTON, ENGLAND, ALDERMAN and McDONALD, JJ., concur.

Elton E. ENSOR, Petitioner,

v.

STATE of Florida, Respondent.

No. 57817.

Supreme Court of Florida.

June 4, 1981.

Rehearing Denied Sept. 25, 1981.

In prosecution for carrying a concealed weapon, the Circuit Court, Orange County,

IN THE SUPREME COURT OF FLORIDA

CHARLES DWIGHT MESSER, :

Appellent, :

v. : CASE NO. 49,780

STATE OF FLORIDA, :

Appellee. :

_____ :

MOTION FOR REHEARING

Appellant, CHARLES DWIGHT MESSER, by his undersigned counsel, hereby moves this Court pursuant to Florida Rule of Appellate Procedure 9.330(a) to grant rehearing on the issues raised in this appeal and respectfully suggests that this Court overlooked or misapprehended the following:

1. On April 26, 1979 this Court issued an opinion in this case upholding appellant's sentence of death. In his petition for rehearing filed on May 10, 1979, appellant raised five issues questioning that opinion. Pursuant to the petition for rehearing this Court withdrew its opinion and ordered a hearing be held in the trial court based on the first issue raised in appellant's petition. When the trial court failed to properly conduct such a hearing, this Court issued an order on June 5, 1980, remanding for another hearing and appointing counsel. After such hearing was held the trial court issued its findings and this Court then entered its opinion dated June 4, 1981, in which appellant's sentence of death was again upheld.

2. Undersigned counsel would first point out that this Court's opinion of June 4, 1981 contains a misstatement of fact at page two (2) when it asserts:

> A lawyer from the office of the Public Defender for the Second Judicial Circuit, who was serving as appointed appellate counsel, was also present, but announced his view that he was without authority

> to speak for appellant at trial-level proceedings or outside the second circuit.

Appellate counsel would point out that he was not present at that hearing since he did not receive notice until the day before the hearing and was of the correct opinion that he did not have statutory authority, absent appointment by this Court, to travel to and practice in another circuit at the trial level. Only after this Court's appointment did undersigned counsel travel to the First Judicial Circuit to represent appellant. Undersigned counsel prays the Court will correct this misstatement because the wording of the opinion makes it appear asif he traveled from Tallahassee, Florida to Milton, Florida only to antagonize the trial judge into committing error. For a correct statement of the facts, see appellant's motion to strike filed January 21, 1980.

3. Appellant would next point out that in its first opinion issued on April 26, 1979, this Court stated at page three (3):

> "The state sought to present this testimony in order to counter any inference, unfavorable to the state's case on this issue of sentence, that the jury might draw from being informed of the final disposition of the charges against the accomplice. The testimony also tended to negate various statutory mitigating circumstances. We hold that the state attorney's testimony was relevent for these purposes and was properly admitted." (emphasis added)

After finding that it was proper for the State Attorney to testify in order to negate various mitigating circumstances, this Court went on to find at page three:

> "We find further from the record that there was no evidence tending to establish the existence of any mitigating factors. The sentence of death was proper."

Appellant, in his petition for rehearing, filed on May 10, 1979 questioned why, if there were no mitigating

factors, would the State Attorney be allowed to testify to negate them. On the other hand, if the State Attorney had to be allowed to testify to negate mitigating factors, then evidence of mitigating factors must have been present that the jury could have considered. It appeared as if the decision allowed the state to have its cake and eat it too. Appellant noted that the problem could have been resolved in one of two ways, either by finding that no mitigating factors existed, thus requiring a new sentencing proceeding wherein the state attorney would be prohibited from testifying, or, in the alternative, by finding that mitigating factors did exist, in which case a new sentencing hearing would be required based on the fact that this Court had ruled out all but two of the aggravating factors argued below. See Elledge v. State, 346 So.2d 998 (Fla. 1977).

This issue on rehearing was similar to another issue raised by appellant concerning the State Attorney's testimony that it was his opinion that the aggravating factors outweighed the mitigating factors. Appellant pointed out that this went directly to the issue to be determined by the jury and therefore was error as an invasion of the providence of the jury.

In its latest opnion of June 4, 1981, this Court withdrew the above-cited language but failed to explain what had happened to the mitigation mentioned in its April 26, 1979 opinion. In addition, this Court again failed to point out why the State Attorney should be allowed to give his opinion as to the weighing of the aggravating and mitigating factors. The Court only stated:

> We hold that it was within the discretion of the trial court to allow the state to explain to the jury, through the testimony of the state attorney, the reasons for the seemingly disparate treatment.

Appellant has no problem with this statement and notes that the state was allowed to do such. But the record shows that the state went too far when it used this pretense to allow the State Attorney to go on to argue from the witness stand that there were no mitigating factors to be considered. As this Court has held time and again, the jury may consider non-statutory mitigating factors in reaching it determination. The statements of the State Attorney clearly precluded any possibility of the jury making such a consideration in the instant case and it is obvious from the language used by this Court in its April 26, 1979 opinion that the possibility of mitigation in the instant case did exist. The only way to clear up this question is to hold a new sentencing hearing at which the State Attorney is advised not to give his opinions and the jury is advised that there are only two aggravating circumstances to be weighed against possible non-statutory mitigating circumstances.

4. This Court, in issuing its opinion, has also failed to respond to appellant's second point raised in his petition for rehearing filed on May 10, 1979. That point raised the question of a psychological screening report that was forwarded to this Court by the then Department of Offender Rehabilitation. Appellant requested in his petition and continues to request in this motion that the Court determine if and when it received that report, if and when that report was destroyed, and whether or not that report was read and considered by any members of this Court.

Appellant previously indicated that the receipt of the report by this Court would be a direct violation of Gardner v. Florida, 430 U.S. 349 (1977). Appellant is well aware of the opinion of this Court in Brown v. Wainwright, 292 So.2d 1322 (Fla. 1981) but believes that the Brown

decision is erroneous and was based on a misinterpretation of Gardner. As noted in Gardner, the sentencing process in a case involving the imposition of death must satisfy the requirements of the Due Process Clause. The United States Supreme Court clearly stated that:

> The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process. 430 U.S. 349 at 358.

In attempting to avoid the protective cloak of Gardner, this Court, in Brwon, argued that it did not "impose" sentence when it reviewed a death case. Such reasoning is illogical since this Court's affirmance of a death sentence clearly acts as part of the imposition of the sentence by the State. This Court is, by statute, a necessary step in the ultimate infliction of death. As such, it imposes the sentence just as surely as the trial judge below or the governor who signs the warrant. The State of Florida, through its laws, imposes the death sentence and not the trial judge alone. Gardner speaks of the process as set forth in the statute and this Court, in going outside the statute, violated Gardner.

Appellant would note in support of this point that this Court must have felt its actions were in some way improper since it destroyed the documents and no longer continues this practice. In light of this, appellant feels that the Court should specifically respond to his questions concerning the psychological report because he was affected by this process before it was stopped. Additionally, the Court should answer appellant's questions concerning the report so that he may properly preserve the facts for possible appeal to the federal courts.

WHEREFORE, appellant prays the Court will grant rehearing in this case, correct its opinion and remand for

a new sentencing proceeding in accordance with this Court's findings relating to the aggravating and mitigating circumstances present. In the alternative, appellant prays this Court will respond to his questions concerning the secret psychological report.

Respectfully submitted,

THEODORE E. MACK
ASSISTANT PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion for Rehearing has been hand delivered to the Honorable Jim Smith, Attorney General, The Capitol, Tallahassee, Florida; and that a copy has been mailed to appellant, Charles Dwight Messer, #025822, Post Office Box 747, Starke Florida 32091 on this the 18th day of June, 1981.

THEODORE E. MACK

Supreme Court of Florida

THURSDAY, OCTOBER 1, 1981

CHARLES DWIGHT MESSER,	**	
Appellant,	**	
	**	
vs.	**	CASE NO. 49,780
	**	
STATE OF FLORIDA,	**	CIRCUIT COURT CASE No. 74-I-21 (Santa Rosa County)
Appellee.	**	
	**	

Upon consideration of the Motion for Rehearing filed by attorney for appellant,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

JB

cc: Hon. Gerald F. Barnes, Clerk
Hon. M. C. Blanchard, Chief Judge
Theodore E. Mack, Esquire
Wallace E. Allbritton, Esquire

Supreme Court of the United States

No. A-419

CHARLES DWIGHT MESSER,

Petitioner

v.

FLORIDA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 30, 19 81.

/s/ Lewis F. Powell, Jr.

Associate Justice of the Supreme Court of the United States

Dated this 13

day of November, 19 81

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by §775.082. The proceeding shall be conducted by the trial judge before the trail jury as soon as practicable. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7) of this section. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life *[imprisonment] or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with §775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record unless the time is extended for an additional period not to exceed 30 days by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capital felony was committed by a person under the age of 18.

(g) The age of the defendant at the time of the crime.

History.—§[illegible], ch. 19584, 1939; CGL 1940 Supp. [illegible]; §119, ch. 70-339; §1, ch. 72-724; §9, ch. 72-724.

*Note.—Bracketed word inserted by the editors.

Note.—See former §919.23.

erred in directing Petitioner to pay Respondent's attorney's fees and costs, and that it was error for the court to fail to specify the parties' responsibilities regarding the obligations incurred by them during marriage. By adopting such an equal position regarding the parties' indebtedness, the court will insure that women have both equal rights and equal responsibilities and obligations as required by Article X, Section 5, Florida Constitution. We therefore must reverse the District Court of Appeal on this point.

Accordingly, the decision of the District Court of Appeal, Second District, is quashed and the cause remanded for further proceedings consistent herewith.

It is so ordered.

ROBERTS, ADKINS and HATCHETT, JJ., concur.

ENGLAND, J., dissents with an opinion.

OVERTON, C. J., and SUNDBERG, J., dissent and concur with ENGLAND, J.

ENGLAND, Justice (dissenting).

I respectfully dissent. We have no jurisdiction to review the district court's decision. Whatever our personal views may be as to the "justice" of the cause, they are not appropriately expressed at this third judicial level unless there is a "direct conflict" between the district court's decisions and those of other Florida appellate courts. Article V, Section 3(b)(3), Florida Constitution. Here there is none.

The trial court had the responsibility to exercise its discretionary authority to consider all facts necessary to do equity and justice between the parties. Section 61.08(2), *Florida Statutes* (1974). Its decision was reviewed in depth by the district court. A majority of the Court, after reviewing the record for a third time, simply disagrees with the result those lower courts reached. Not only is that disagreement constitutionally improper, it is necessarily made from the least reliable source—a second level appellate record.

I would discharge the writ.

OVERTON, C. J., and SUNDBERG, J., concur.

Charles Dwight MESSER, Jr., Appellant,

v.

STATE of Florida, Appellee.

No. 46849.

Supreme Court of Florida.

March 31, 1976.

Defendant was convicted in the Circuit Court, Santa Rosa County, Clyde B. Wells, J., of first-degree murder and robbery and sentenced to death, and he appealed. The Supreme Court, Sundberg, J., held that defendant who did not request mistrial because of courtroom outburst by victim's mother but who emphasized and relied upon such incident in his closing argument could not complain of incident on appeal; and that the failure to allow defendant to submit psychiatric testimony and evidence as to sentence imposed upon defendant's accomplice to jury during sentencing portion of proceeding constituted error, requiring remand of case and impaneling of a special jury to consider improperly excluded evidence.

Convictions affirmed, cause remanded with directions.

1. Criminal Law ⇐659

Disruption which occurred during defendant's closing argument when victim's mother was overcome with emotion and had to be taken from courtroom did not substantially prejudice defendant.

2. Criminal Law ⇐1044.1(3)

Defendant who did not request mistrial because of outburst by victim's mother during defendant's closing argument but who emphasized and relied upon the incident in his argument could not complain of the incident on appeal from conviction.

3. Criminal Law ⇐986, 1177

Although sentence imposed on defendant's accomplice whose actions in striking victim in back of head preceded defendant's firing of fatal shot and who negotiated plea of guilty to second-degree murder was not determinative of sentence to be imposed on defendant upon his conviction of first-degree murder, jury was entitled to consider sentence imposed on accomplice in arriving at its recommendation of sentence to be imposed upon defendant and failure to permit defendant during sentencing portion of trial to submit to jury evidence of accomplice's sentence constituted reversible error. West's F.S.A. § 921.141.

4. Criminal Law ⇐986

Failure to afford defense counsel opportunity to present psychiatric testimony to jury during sentencing portion of murder trial constituted error. West's F.S.A. § 921.141(6)(b).

5. Criminal Law ⇐986

Circuit judge should exercise broadest latitude in admitting evidence during sentencing portion of jury's deliberations. West's F.S.A. § 921.141(1).

6. Jury ⇐71

Where evidence of mitigating circumstances was improperly withheld from jury during sentencing portion of trial, special jury would be impaneled to consider such evidence and make its recommendation to trial court. West's F.S.A. § 921.141(1).

James Ron Shelley, Public Defender, and John W. Fleming, Asst. Public Defender, for appellant.

Robert L. Shevin, Atty. Gen., and Gerald L. Knight, Asst. Atty. Gen., for appellee.

SUNDBERG, Justice.

Appellant, a 29-year-old male, appeals his conviction for first degree murder and robbery and sentence of death. This Court has jurisdiction under Article V, Section 3(b)(1), Florida Constitution, and Section 921.141(4), Florida Statutes. The facts of the case are as follows.

On the morning of November 27, 1973, two hunters discovered the body of a male, 25 to 30 years old, in a partially wooded area called Garcon Point. The hunters called the Sheriff's Department, and subsequent investigation revealed that the body was that of Henry N. Fowler, III, who died of a bullet wound in the brain. In January, 1974, appellant advised Alabama authorities that he wanted to clear his conscience about a Florida killing. The Florida State Attorney traveled to Alabama; when immunity was refused, appellant agreed to "talk" anyway, waiving his *Miranda* rights. He told the State Attorney that he and Ronnie Brown (subsequently his co-defendant) were present when a third man killed and robbed the victim; appellant identified photographs of the victim and the scene of the crime. The following day appellant waived for the second time his *Miranda* rights and made a second statement which was similar to the first but with certain differences; he agreed to travel to Florida in order to point out the location of the crime. On January 23, 1974, appellant visited and identified the scene of the crime; also, he waived his *Miranda* rights for the third time and gave two more recorded statements. In

the meantime, a statement had been taken from co-defendant Brown. According to appellant's final statement, he and Brown had been traveling on the Interstate Highway, he had been drinking liquor and beer, and they stopped at a rest area to look for toilet facilities. When they stopped, they decided to rob the victim, who was asleep in a parked car in the rest area. The pair entered the victim's car, held him up, drove him to several locations; ultimately Brown struck the victim, and appellant shot him once in the head. Brown had previously taken the victim's wallet and watch, and the pair divided $120.00 and disposed of the victim's wallet, personal effects, and car tag.

Appellant was indicted on February 6, 1974, for the first degree murder and robbery of Henry N. Fowler, III. Appellant's motion to suppress confession was heard by the trial court on December 2, 1974, which motion was denied, the court finding that appellant was fully aware of his *Miranda* rights at the time he made his statements, that appellant's statements were not the result of any promise, threat or undue influence, that his statements were freely and voluntarily made, and that appellant intelligently waived his *Miranda* rights. At the close of the suppression hearing appellant's jury trial commenced. On the second day of the trial appellant moved for a mistrial on the ground that two deputies who were witnesses went to lunch with the jury; that motion was denied after court investigation revealed that no discussion about the case occurred between the deputies and the jurors. During the course of the trial appellant's attorney was permitted to place in the record (but not put before the jury) the fact that appellant's co-defendant Brown had entered a plea of guilty to second degree murder and had been sentenced thereon. After the jury found appellant guilty as charged the court proposed to commence the advisory sentencing hearing on the following morning; appellant's attorney objected on the grounds that he had not had sufficient time to prepare for such hearing, but this objection was overruled. During the advisory sentencing hearing, appellant's counsel was not allowed to introduce into evidence a demonstration with a metronome designed to show the jury the severity and length of twenty-five years in prison as a sufficiently severe alternative to the death penalty; this demonstration was ruled inadmissible as being irrelevant to the issue. A majority of the jury recommended the death penalty, which recommendation was followed by the court which sentenced appellant to die in the electric chair. This appeal followed.

We first turn our attention to the fact that an outburst by the victim's mother occurred in the courtroom during appellant's closing argument to the jury. According to the record, appellant's attorney was in the midst of his closing argument when the events with which we are concerned took place. These events are documented in the record as follows:

> "(At this point, a woman seated in the courtroom was overcome with emotion and was taken from the courtroom. It was later determined by the court reporter that this was the victim's mother.)"

Immediately following that notation, the record reveals that appellant's attorney did not object or request a mistrial at this point but, instead, continued his closing statement as follows:

> "That's what we're dealing with right there—a boy is dead, and I want someone to die. It is the same total disregard for life and breath that God gives that led Charles Messer to kill an innocent man in the wilderness."

At this point appellant's attorney requested a break in his argument; a brief recess was taken after which the court recessed for lunch. Thereafter, appellant's attorney continued his closing argument—again without objection regarding the outburst earlier, without having the jury instructed

to disregard it, and without moving for a mistrial. He argued as follows:

> "Just before we broke for the luncheon recess the lady that I think you know who she is because of the questions that were asked you before we selected the jury that's in the box now—there was an outburst, and the court has offered to give an instruction to disregard it because you are not to consider it—that's not something you should consider under the law and instructions of the court. I made a comment just before we broke, and I feel that we have to go back to that comment to pick up the continuity of where I was at . . . . [W]hat we saw there—what was taking place with that lady—is exactly what's involved in whether or not this community is going toward the execution of this defendant. It is called revenge . . . . And that's the point I was trying to make when we had that difficulty before."

In his rebuttal argument, appellant's attorney in referring to the death penalty statute stated as follows:

> ". . . [T]hat's not a bad law. It simply says we will admit the feelings of wrath, of vengence, or resentment, the desire to take the mother of this boy and take her to one side and say, 'we're going to try to make things right . . . .'"

After the jury's verdict of guilty was returned the court held a sentencing hearing. At the beginning thereof the court conducted an evidentiary hearing on a motion for new trial based on the statements made by the victim's mother during the closing argument. The State Attorney did not object to the hearing of witnesses on this matter, stating that he was in the court and could not hear the mother's remarks and that he wanted to clarify for the record whether or not the jury was able to hear her. Three witnesses were examined under oath, the first being a newspaper reporter who testified as follows:

> "A It was during arguments to the jury as to the death penalty. You were making your comments to the jury at that time.
>
> "Q What occurred, sir?
>
> "A . . . I turned to observe Mrs. Fowler being led from the courtroom in tears.
>
> * * * * * *
>
> "A She was the mother of the victim.
>
> "Q Were you able to make out any of the words or anything that she said?
>
> "A No, sir, I was not. I did hear some words being spoken, but it took me in such a surprise that I didn't actually hear myself.
>
> * * * * * *
>
> "A . . . I don't recall observing any emotion the jury might have had.
>
> * * * * * *
>
> "JUDGE: That would put you some 30—35 feet from the jury box yourself, is that correct?
>
> "A Yes, sir.
>
> * * * * * *
>
> "JUDGE: So [Mrs. Fowler] would have been roughly 25 feet from the jury, wouldn't you say?
>
> "A Yes, sir, I would say that.
>
> * * * * * *
>
> "JUDGE: And you didn't understand what she said?
>
> "A No, sir. It was not audible to me.
>
> * * * * * *
>
> "Q . . . Did you feel it was a dramatic outburst?
>
> "A I felt it was. . . ."

The second witness examined was a deputy sheriff who testified as follows:

"Q Did you hear, and can you describe what occurred?

"A I heard a sound, but I cannot describe the words that were said.

* * * * * *

"Q At the time you heard them, could you hear what was said?

"A No, sir. It was not something that I could understand.

* * * * * *

"JUDGE: So you would have been roughly 20 to 25 feet from the lady as she was speaking, is that correct?

* * * * * *

"A Yes. And it would be approximately 20–25 feet."

The third witness examined was an investigator with the sheriff's department who characterized the occurrence as a "disruption"; he stated under oath:

"A . . . There was some statement made to the jury when I observed her or heard her make some statement, which I couldn't put it all together, and then she was taken out of the courtroom. . .

"Q Were you able to hear anything that she did say?

"A I couldn't put it all together, no sir.

"Q Could you give it to us in pieces?

"A . . . She stated, 'How do you know that he done something. . .', and at that point she was taken out of the courtroom, and I couldn't hear the rest of it. She didn't say it all that loud."

The record indicates that, having heard this testimony, and having considered appellant's motion for new trial, the court entered its denial.

We note with interest that on page eight of appellant's own brief he states: "In all candor Appellant concedes that there is ample evidence to sustain the judgment of conviction and that said evidence was properly admitted. Appellant also concedes that there was no substantial prejudice caused by the minor incidents raised in Appellant's assignments of error . . . 4 [relating to the mother's courtroom outburst]."

[1,2] We must agree with appellant's characterization that this event was a "minor incident" which did not substantially prejudice him. We are particularly inclined to this view in light of the fact that appellant's counsel in his argument emphasized both the outburst, which apparently was not heard by the jury, and the revenge motive which allegedly was expressed. Having taken advantage of the situation, appellant may not be heard to complain of it now merely because his argument was not accepted.

We have considered appellant's remaining points on appeal with respect to the verdict and judgment of guilt of the crimes charged and find them to be without merit.

[3] We now turn our attention to the question of whether the death penalty statute was properly applied by the trial court during the sentence advisory hearing portion of the trial.[1] It is our conclusion that the trial court erred in application of the statute in two particulars. First, although there is evidence in the record of the plea-bargained second degree murder sentence received by appellant's accomplice Brown, appellant was not permitted, during the sentencing portion of the trial, to submit this evidence to the jury. We believe the jury was entitled to know that the co-defendant, Ronnie Brown, negotiated a plea of guilty to second degree murder and was sentenced to 30 years imprisonment. See *Slater v. State*, 316 So.2d 539 (Fla. 1975). Although the *Slater* case, *supra*, involved evidence that the "trigger man" was permitted to negotiate a plea for a sen-

1. Fla.Stat. § 921.141 (1973).

tence of life imprisonment, under the facts of this particular case we believe the reasoning of *Slater* applies with equal force. It was there stated, "Defendants should not be treated differently upon the same or similar facts." In the instant case, although the appellant did fire the shot into the head of the victim, this shooting occurred after Brown took a wallet containing $120 and a watch from the victim, then struck him in the back of the head. There is little to separate out the joint conduct of the co-defendants which culminated in the death of the decedent. The sentence afforded to Brown certainly is not determinative of the sentence which appellant should receive; however, the jury should have had the benefit of the consequences suffered by the accomplice in arriving at its recommendation of the sentence to be visited upon the appellant.

[4, 5] Additionally, we believe counsel for the defendant was effectively deprived of establishing an important mitigating circumstance when he was not afforded the opportunity to present psychiatric testimony to the jury during the sentencing portion of the proceedings. Subsection 921.141(6)(b), Florida Statutes, provides as a mitigating circumstance that "[t]he capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance." Counsel for the appellant represented to the court that, if given the opportunity, he would come forward with evidence establishing such condition. The expression by the trial court that the verdict of the jury is merely advisory and that he could consider psychiatric reports at the time he performed the actual sentencing, in our opinion, violates the legislative intent which can be gleaned from Section 921.141, Florida Statutes. It is clear that the Legislature in the enactment of Section 921.141, Florida Statutes, sought to devise a scheme of checks and balances in which the input of the jury serves as an integral part. The validity of the jury's recommendation is directly related to the information it receives to form a foundation for such recommendation. Subsection 921.141(1), Florida Statutes, provides in part:

> ". . . In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) [sic] and (7) [sic] [of this section]. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. . . ."

The quoted language indicates that the circuit judge should exercise the broadest latitude in admitting evidence during the sentencing portion of the jury's deliberations.

[6] Accordingly, we are compelled to the conclusion that this cause should be remanded to the trial court for the purpose of conducting another sentencing hearing before a jury impaneled for that purpose at which the evidence improperly excluded may be considered. We recognize that this will result in a hearing before a different jury from that which heard the evidence upon which the verdict of guilty was rendered. However, we find authority for such procedure in that portion of Subsection 921.141(1), Florida Statutes, which states:

> ". . . If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. . . ."

Also, by Chapter 74-379, Laws of Florida, effective October 1, 1974, the following language was added to Subsection 921.141(1), Florida Statutes:

> ". . . If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of

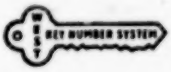
penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in Chapter 913 to determine the issue of the imposition of the penalty. . . ."

Even though the last-quoted provision was not in effect at the time of the offense or at the time the appellant was indicted,[2] it buttresses our conclusion that the proper course in this analogous situation is to impanel a special jury to consider the evidence of aggravating and mitigating circumstances and make its recommendation to the trial court for proper sentencing pursuant to Section 921.141, Florida Statutes.

The judgments of guilt of robbery and of first degree murder are affirmed but the cause is remanded to the trial court with directions to conduct further proceedings consistent with the views expressed herein.

It is so ordered.

OVERTON, C. J., and ROBERTS, ADKINS, BOYD, ENGLAND and HATCHETT, JJ., concur.



The DIVISION OF BEVERAGE of the STATE of Florida, DEPARTMENT OF BUSINESS REGULATION, Appellant,

v.

FOREMOST-McKESSON, INC., a corporation, Appellee.

No. 47334.

Supreme Court of Florida.

March 31, 1976.

Liquor distributor sought, inter alia, declaration that it was entitled to renewal of its license to distribute liquor in Florida. The Circuit Court for Leon County, Hugh M. Taylor, J., ruled that distributor was entitled to benefit of grandfather clause of governing statute, and appeal was taken to the District Court of Appeal. A motion to transfer the appeal was granted. The Supreme Court, Hatchett, J., held that under grandfather clause, which provides that any corporation holding a license as a distributor on June 3, 1947 is entitled to renewal thereof, notwithstanding statutory ban on licensing of out-of-state manufacturers or association of a Florida manufacturer with an out-of-state manufacturer, etc., applied to all distributors holding license as of June 3, 1947 without regard to whether distributor was then affiliated with an out-of-state rectifier, etc., and that a distributor so licensed was entitled to renewal of its license notwithstanding that it engaged in the prohibited affiliation after June 3, 1947.

Judgment affirmed.

England, J., dissented with opinion.

Adkins, J., dissented on the merits and concurred with England, J., on jurisdiction.

Intoxicating Liquors ⇐102

Provision of grandfather clause of liquor licensing statute that any corporation which held a license as distributor on June 3, 1947 was entitled to a renewal thereof notwithstanding statutory ban on licensing of out-of-state manufacturers or association of a Florida manufacturer with an out-of-state manufacturer, etc., applys to all distributors holding a license as of such date without regard to whether the distributor was then affiliated with an out-of-state manufacturer, etc.; a distributor so licensed is entitled to a renewal of its license notwithstanding that it engaged in the prohibited affiliation only after June 3, 1947. West's F.S.A. §§ 561.24, 561.24(5).

2. *Castle v. State*, 330 So.2d 10 (Fla.1976).

STATE OF FLORIDA, +

Plaintiff, +

Vs. +

CHARLES D. MESSER, +

Defendant. +

SENTENCING VERDICT

A majority of the Jury advise and recommend to the Court that it impose the death penalty upon the Defendant, Charles Dwight Messer.

Claude Russell
FOREMAN

May 26 1976
date

Filed May 26, 1976
H. F. Barnes Clerk

FILED FOR RECORD THIS 26
DAY OF May A.D.
19 76 AT O'CLOCK
M AND RECORDED IN VOL T
AT PAGE 190 OF Crim Ct
RECORD VERIFIED.
H. F. Barnes
CLERK CIRCUIT COURT
BY Louise McKellar
DEPUTY CLERK
SANTA ROSA COUNTY, FLORIDA

CERTIFIED A TRUE AND CORRECT COPY
GERALD F. BARNES
CLERK CIRCUIT COURT
By Louise McKellar, D.C.

F-1

STATE OF FLORIDA

UNIFORM COMMITMENT TO CUSTODY OF DIVISION OF CORRECTIONS

IN THE CIRCUIT COURT IN AND FOR
(Court)

SANTA ROSA County. SPRING Term, 19 76

Conviction for First Degree Murder and Robbery
(Offense)

Date of conviction January 3, 1975

Date of sentence imposed June 1, 1976

Term of sentence Death in the Electric Chair

STATE OF FLORIDA,

Plaintiff,

vs.

CHARLES DWIGHT MESSER
Defendant.

"Case No. 74-I-21"

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA, TO THE SHERIFF OF SAID COUNTY AND THE DIVISION OF CORRECTIONS OF SAID STATE, GREETING:

The above named defendant having been duly charged with the above named offense in the above styled Court, and he having been duly convicted and adjudged guilty of and sentenced for said offense by said Court, as appears from the attached certified copies of

XXXXX
(Indictment) (Information)

judgment and sentence, which are hereby made parts hereof;

Now, therefore, this is to command you, the said Sheriff, to take and keep and, within a reasonable time after receiving this commitment, safely deliver the said defendant into the custody of the Division of Corrections of the State of Florida; and this is to command you, the said Division of Corrections, by and through your director, superintendents, wardens, and other officials, to keep and safely imprison the said defendant for the term of said sentence in the institution in the state correctional system to which you, the said Division of Corrections, may cause the said defendant to be conveyed or thereafter transferred. And these presents shall be your authority for the same. Herein fail not.

WITNESS the Honorable C. Joe Bullock

Judge of said Court, as also GERALD F. BARNES

Clerk, and the Seal thereof, this the 1st day of June, 19 76

Herald F. Barnes
Clerk of said Court

(To be used in committing defendants under indeterminate sentences as well as under sentences of imprisonment for definite periods.)

CERTIFIED A TRUE AND CORRECT COPY
GERALD F. BARNES
CLERK CIRCUIT COURT
By Virginia W. Bullock
DEPUTY CLERK

23

F-2

STATE OF FLORIDA, :

Plaintiff :

vs. : 74-I-21

CHARLES D. MESSER, :

Defendant. :

.. ..

FILED
CLERK'S OFFICE

FINDINGS OF FACT

Pursuant to Section 921.141(3), the Court makes the following findings of fact which constitutes the justification for the imposition of the sentence herein administered:

a. That the crime of First Degree Murder was committed while the Defendant was in the process of committing the crime of robbery (for which he has likewise been convicted).

b. That the crime was committed for pecuniary gain in that the Deceased was robbed of $120.00, and other property at the time of the commission of this offense.

c. That the murder was committed in a manner the Court finds to be especially atrocious and cruel in that the victim was taken in his automobile at gun point to two different locations, was required to get into the trunk of his automobile where he was transported, repeatedly told the Defendant he had no intentions of resisting, and finally was hit over the head and shot and left to die in the woods.

d. That by the Defendant's own statement his last 15 years were devoted to criminal behavior, but specifically finds that the Defendant was previously convicted of the crime of manslaughter.

e. That the Defendant was the leader of the two co-defendants, and that the sentence received by the Defendant, Brown, (which was not passed by this Court) is not a justification for this Defendant receiving a lesser sentence.

f. The Court has reviewed those mitigating circumstances contained in Section 921.141(6)(a) through (g), and finds that none of those mitigating circumstances are present. In making this finding, the Court has considered the

testimony of the two clinical psychologists and the psychiatrist who testified, none of whom diagnosed the Defendant to have been suffering any extreme mental or emotional disturbance at the time of the commission of the offense.

Based on the above findings, the Court concludes that sufficient aggravating circumstances exist to require the sentence of death in the electric chair, and that no mitigating circumstances exist which would allow this Court to reduce that sentence to life imprisonment.

will hear no evidence on that, but will consider that as a fact.

JOHNSON: Your Honor, at this time the State would call Mr. Curtis Golden as a witness.

RECESS

SHELLEY: Your Honor, Mr. Curtis Golden, for the purpose of the record, is the State Attorney for the First Judicial Circuit. He has been called as a witness on behalf of the State. We feel that, of course, he can testify as to the disposition of the co-defendant's case, but if he seeks to give his reason for the negotiation he must be restricted in that effort to introducing evidence by means of his assistant in the courtroom, rather than testifying as to his reasons. Is my point clear to the court?

JUDGE: No.

SHELLEY: The State Attorney -- I have taken his deposition. I have a copy of it here, and the State has a copy. He rationalized his negotiation for accepting a plea to second degree on many factual matters. For instance, the candidness and extent of Brown's confession. Ronnie Brown was of low intelligence and only had an eighth grade education. Brown was a follower rather than a leader. That Charles Messer had a two year education -- was aggressive.

Those are the major points. Now, we have no objection, of course, if the State wishes to produce evidence on the point of Mr. Brown's education or Mr. Messer's education, or any of these other points -- if he wants to produce evidence of his leadership -- but the argument should come at the close of all the evidence rather than under oath and from the witness stand.

We feel that the State Attorney rationalized his negotiation. My deposition did not ask for that rationalization. No one has the authority to ask him that question. If he wanted to volunteer it, he could, but that I was not to inquire.

JUDGE: You consider it would be improper for the State now to illicit his reasons for making the decision as an elected official to do what he did, i.e., to grant...

SHELLEY: To accept a plea to second degree, that the only alternative would be for him, by his assistant, to introduce evidence to the facts of that rationalization, and then to have his assistant argue those facts to the jury at the close of the evidence.

JUDGE: What evidence could he put on, for instance, as to the aggressiveness of Messer as opposed to the aggressiveness of Brown?

SHELLEY: This is precisely my point, Your

Honor. There is no way I can cross examine such statements.

JUDGE: It would be an opinion, wouldn't it?

SHELLEY: Yes, sir. And his opinion should be expressed, I suppose, if it is at all, in the manner in which the prosecution takes place, and the evidence is introduced, and the arguments of counsel at the close of all the evidence.

JUDGE: Mr. Johnson, do you want to respond to that?

JOHNSON: Yes, Your Honor. One of the mitigating circumstances under the Florida Statute, Section 921.141, is that the defendant for one thing had no significant history of prior criminal activity. Ronnie Brown had never been arrested before in his life.

Another mitigating circumstance is the fact that...

SHELLEY: We have no objection to evidence from the witness stand as to no prior record, but that certainly can't come from Curtis Golden whose only information must be hearsay. There is no way for us to cross examine.

JOHNSON: And under Sub-section 6-C, "Defendant acted under extreme duress or under substantial domination of another person." I think that Mr. Golden

can testify that their investigation revealed that Defendant Messer was the primary perpetrator of this crime, and that Brown acted under domination of Messer.

SHELLEY: That, of course, is subject to argument -- closing argument -- for the jury to consider, but not to receive it in testimony from the stand.

JUDGE: Well, it appears to me that Mr. Golden would have the same right or responsibility to tell the basis upon which he accepted that negotiated deal as he did in making the deal to start with. The court has cast upon us the burden to require the jury to hear that evidence, i.e., that the co-defendant did get a negotiated deal, and so in furtherance of that evidence I think it is incumbent upon this court to hear the reason why, and since Curtis Golden apparently made that decision then I think it is incumbent upon him to tell the jury why he made it, and let them weigh that along with the other. So, I would allow it to be made.

SHELLEY: Your Honor, I accept the court's ruling. However, because I was reprimanded by the Supreme Court for not timely moving for a mistrial, and I don't want to disrupt the procedure here, but I do want to state that his testimony, if it is given, could result in a mistrial. So, I would move at this

time, rather than interrupting Mr. Golden's testimony, to make that motion in the presence of the jury. In the alternative, if the court feels that that motion shouldn't be made, then we would ask that immediately upon my objection that the court ask the jury to step out so that I can formally move for mistrial, and let the court rule on that.

JUDGE: All right. Bring the jury in.

JURY RETURNED TO BOX

JOHNSON: The State would briefly call back Mr. Knapp.

* *

R I C H A R D K N A P P, having been recalled to the stand, testified as follows, to wit:

EXAMINATION BY

MR. JOHNSON:

Q You are the same Mr. Knapp that testified previously in this case, is that correct?

A Yes, sir.

Q There are a couple of things I neglected to ask you that I would like to bring out at this time. Do you recall what Henry Fowler was wearing at the time that he left you?

A He had on a white karate jacket.

Q I show you what has been marked as State's Exhibit

Q And that is the reason you did not consider...

A That is the reason, and the reason I have never relied upon those in my investigations.

Q During the course of your investigation did you have the occasion to learn how co-defendant Brown met the defendant Messer?

A Yes, sir, it is my understanding that they met while Mr. Messer was incarcerated in jail in Bonifay, Florida.

Q Do you know how it came about that Brown met Messer there, sir?

A It is my understanding that Mr. Brown's brother-in-law was a juvenile counselor in Bonifay, and it was through the visits of Mr. Brown to the jail while Mr. Messer was in jail that he met him.

Q During the course of your investigation, sir, did you have the occasion to learn who was apparently the leader in this criminal activity?

A Yes, sir. In talking with Mr. Messer and talking with Mr. Brown in investigating this matter it became obvious to me that Mr. Messer was the more intelligent of the two. Mr. Brown had an eighth to tenth grade education. He was of rather low intelligence. He seemed to be the type of person who was a follower. Mr. Messer on the other hand was a leader, and it appeared that at all times that the defendant Mr.

Messer was the one who was the dominant influence in the relationship.between the two.

SHELLEY: Excuse me, Mr. Johnson. At this time I renew my motion that was raised yesterday in regard to arguing before the court. If the court will rule, rather than taking the jury out of the jury box...

JUDGE: Denied.

Q Mr. Golden, did any of these reasons have bearing on the reason you accepted a plea to second degree murder by the co-defendant Brown?

A Yes -- those and other reasons.

Q What were those other reasons?

A Well, as I stated before, Mr. Brown had no previous record of criminal activity prior to the time he met Mr. Messer. This particular reason -- and also, it was actually through Mr. Brown's cooperation and his statement that we were able to solve this case and arrive at the truth. It is true that Mr. Messer first mentioned the fact he was a witness, and it was through his statement to Mr. Mannis that we were able to determine that he and Mr. Brown were suspects in the case, but it was not through his cooperation that we solved the case: it was through the cooperation of Mr. Brown. Mr. Brown was very remorseful about it. He cried quite a bit in

the interview at the time that he told us about it, and he was quite cooperative. And it was for these reasons that I felt that these mitigating circumstances outweighed or neutralized the aggravating circumstances in the case. And, under the law, if a person is convicted of first degree murder and the jury recommends mercy, and the judge accepts that, then the penalty is life imprisonment. Under the law the maximum penalty for second degree murder is life imprisonment. So, I felt that rather than to -- I felt that the mitigating circumstances neutralized the aggravating circumstances in his particular instance. And, I felt for that reason that the jury in all probability would recommend mercy, and the judge would probably grant that, and I felt that there was no reason to put the State of Florida to the expense of trying him if he would plead guilty to second degree murder and his maximum penalty could be the same as under first degree. So, I accepted the plea to second degree murder with the opinion that he would in all probability receive life imprisonment.

Q Was there any negotiation between the State of Florida and Defendant Brown as to what sentence he would receive?

A There was absolutely no negotiations whatsoever. The only negotiation was that the State of Florida would

allow him to plead guilty to second degree murder, and it would be left to the court to determine what the sentence would be, and I was of the opinion at that time that it would in all probability be life imprisonment.

Q But, in fact, he received a lesser sentence, is that correct?

A That is correct. He received 30 years in prison, but this was not due to any negotiation on the part of the State of Florida.

Q He entered a plea with no recommendation from the State of Florida, is that correct?

A That is absolutely correct.

Q And that was Judge Wade that sentenced that defendant instead of Judge Wells, is that right?

A I believe that's correct.

Q You mentioned remorse on the part of Defendant Brown. Is there any remorse on the part of the Defendant Messer?

A Absolutely not -- not one note of remorse in his voice as he told about it.

Q Would you describe it as maybe an attitude of contempt for the deceased?

SHELLEY: Your Honor, the objection will be renewed throughout, rather than interrupt you

in testimony. It is impossible to rebut this type of evidence. There is no way we can cross.

JOHNSON: Your Honor, according to the statute it is not limited to the strict rules of evidence in normal proceedings.

SHELLEY: I'm not asking for strict rules of evidence. I'm just asking for an opportunity -- let me understand your ruling?

JUDGE: The court has ruled that it will allow questioning regarding the physical characteristics demonstrated by Defendant Messer and the Defendant Brown, but it is going a little far when you get into the area of the law when it is the prerogative of the court to do that.

With that in mind, you may proceed.

BY MR. JOHNSON:

Q Was there any particular reason, Mr. Golden, why you didn't negotiate a plea to second degree murder with Defendant Messer?

A Yes, sir, there was.

Q What was that?

A Well, for one thing there were four aggravating circumstances detailed by the statute present. It was a

heinous and cruel...

SHELLEY: Your Honor, at this time we would renew the objection...

JUDGE: That objection will be sustained.

SHELLEY: Thank you.

Q You started renumerating, sir -- there were aggravating circumstances in your opinion, is that correct?

A That is correct. Yes, sir.

Q Itwas for this reason that no ...

SHELLEY: Your Honor, he is continuing to do the same thing. The court just sustained my objection.

JUDGE: I will let him express his opinion that they were aggravating circumstances, but the jury will draw their own conclusions as to whether or not they were aggravating circumstances and what they were.

A Mr. Johnson, I found no mitigating circumstances.

Q And it is for this reason he was prosecuted for the crimes he was charged with?

A That is correct.

JOHNSON: Thank you. That is all.

JUDGE: Mr. Golden, was it part of your agreement with Brown that he testify against co-defendant Messex?

A No, sir, it was not.

Supreme Court of Florida

No. 49,780

RECEIVED
APR 30 1979
PUBLIC DEFENDER
2nd JUDICIAL CIRCUIT

CHARLES DWIGHT MESSER, JR., Appellant,

vs.

STATE OF FLORIDA, Appellee.

[April 26, 1979]

PER CURIAM.

Charles Dwight Messer was convicted in the Circuit Court of the First Judicial Circuit, in and for Santa Rosa County, of the crimes of murder in the first degree and robbery. The trial court judge, adopting the recommendation of the jury, sentenced the appellant to death. On appeal to this Court, the judgments of conviction were affirmed but the sentence of death was vacated and the case remanded for a second trial on the issue of sentencing.[1] Pursuant to section 921.141(1), Florida Statutes (1973), a jury was impaneled to hear evidence and render a second advisory sentence. Again the penalty of death was recommended and the recommendation was followed by the trial court judge. This Court has jurisdiction of the appeal and must review the propriety of the sentence of death.[2]

The facts of the case appear in this Court's earlier opinion. The appellant and an accomplice found the victim sleeping in a car at an interstate highway rest area. They robbed him and took him by automobile to a wooded area. There the accomplice struck the victim and the appellant shot him in the head with a pistol.

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[1] Messer v. State, 330 So.2d 137 (Fla. 1976).

[2] Art. V, § 3(b)(1), Fla. Const.; § 921.141(4), Fla. Stat. (1975).

Our decision to remand for a second sentencing trial was based on two grounds. We held that the appellant was entitled to present to the jury psychiatric testimony relevant to the statutory mitigating circumstance: "The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance." § 921.141(6)(b), Fla. Stat. (1973).

We also said that it was improper for the court to have kept from the jury evidence of the disposition of the case against the accomplice. The accomplice negotiated a guilty plea to a charge of second-degree murder and was sentenced to thirty years' imprisonment. Citing the case of Slater v. State, 316 So.2d 539 (Fla. 1975), we observed, "There is little to separate out the joint conduct of the co-defendants which culminated in the death of the decedent." While pointing out that the sentence imposed on the accomplice is certainly not determinative of what sentence should be imposed on the appellant, we said that "the jury should have had the benefit of the consequences suffered by the accomplice in arriving at its recommendation . . . ." Messer v. State, 330 So.2d 137, 142 (Fla. 1976).

Section 921.141(1), Florida Statutes (1973), provides that in the sentencing proceeding, "evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6)[sic] and (7)[sic] of this section." The process of weighing of circumstances by the jury is strictly limited with regard to what evidence tending to aggravate the capital felony may be admitted. "[R]egardless of the existence of other authorized aggravating factors we must guard against any unauthorized aggravating factor going into the equation . . . ." Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977). But the process should embrace all matters tending to mitigate the punishment. Cf. Lockett v. Ohio, _____U.S._____, 98 S.Ct. 2954, 57 L.Ed. 2d 973 (1978)(plurality opinion); Songer v. State, 365 So.2d 696, 700 (Fla. 1978)(on rehearing).

At the second sentencing proceeding, the court allowed the state to present the testimony of the state attorney, explaining the

factors behind his decision to negotiate a plea of guilty of second-degree murder in the case of the accomplice while prosecuting the appellant for first-degree murder and seeking the death penalty. The appellant now contends that this was improper.

The state sought to present this testimony in order to counter any inference, unfavorable to the state's case on the issue of sentence, that the jury might draw from being informed of the final disposition of the charges against the accomplice. The testimony also tended to negate various statutory mitigating circumstances. We hold that the state attorney's testimony was relevant for these purposes and was properly admitted.

The trial court judge, as is required by the capital felony sentencing law, section 921.141, Florida Statutes (1973), issued written findings of fact in support of the sentence of death. Upon our independent review of the record, we find that there was sufficient evidence to prove beyond a reasonable doubt the existence of two statutory aggravating circumstances, previous conviction of a felony involving violence to the person and that the capital felony was committed in the course of a robbery. These appear as paragraphs (b) and (d) of section 921.141(5), Florida Statutes (1973). The previous conviction was properly admitted and considered even though it occurred after the capital felony for which the sentence was imposed. Elledge v. State, 346 So.2d 998 (Fla. 1977).

We find further from the record that there was no evidence tending to establish the existence of any mitigating factors. The sentence of death was proper. Alford v. State, 307 So.2d 433 (Fla. 1975); State v. Dixon, 283 So.2d 1 (Fla. 1973).

Accordingly, the sentence of the circuit court is affirmed.

It is so ordered.

ENGLAND, C.J., ADKINS, BOYD, OVERTON, SUNDBERG and HATCHETT, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Santa Rosa County,

Clyde B. Wells, Judge - Case No. 74-I-21

Theodore E. Mack, Assistant Public Defender, Tallahassee, Florida,

for Appellant

Jim Smith, Attorney General; and Wallace E. Allbritton, Assistant Attorney General, Tallahassee, Florida,

for Appellee

IN THE SUPREME COURT OF FLORIDA

CHARLES DWIGHT MESSER,	:	
Appellant,	:	
v.	:	CASE NO. 49,780
STATE OF FLORIDA,	:	
Appellee.	:	
_____	:	

PETITION FOR REHEARING

Petitioner, CHARLES DWIGHT MESSER, by his undersigned counsel, hereby petitions this Court pursuant to Florida Appellate Rule 3.14 to grant rehearing on the issues raised in this appeal, and petitioner respectfully suggests that this Court omitted or neglected to fully consider the following:

A. Defendant's Pending Motion To Clarify And The Failure Of The Trial Court To Provide The Pre-Sentence Investigation Report.

On June 16, 1977, this Court directed the trial judge below to file a response stating whether he imposed the death sentence in consideration of any information not known to appellant. This Court also directed the trial judge to furnish copies of his response along with copies of any sentencing information to the Court and both counsel for the state and counsel for appellant. This directive was issued by this Court pursuant to Gardner v. Florida, 430 U.S. 349 (1977).

On September 26, 1977 the trial judge issued his response stating twice that he had considered a pre-sentence investigation report and further stating that he was ordering the Clerk of the Court to send copies of that report along with copies of psychiatric and psychological reports to this Court. Upon receipt of the trial judge's response, counsel for appellant timely

filed, on October 3, 1977, a motion in this Court requesting that the trial judge be required to clarify his response to indicate whether these reports had been furnished to appellant or his trial counsel. This was necessary because although the trial judge had indicated that he saw a pre-sentence investigation report, he did not state whether that report had been furnished to the defendant or trial counsel. As of this date, counsel for appellant has received no reponse to his motion, has received no response from the trial judge, and no copies of the reports have been filed in this Court or furnished to counsel for appellant.

Pursuant to Florida Appellate Rule 3.9, counsel for appellant had the right to believe that the proceedings in this cause were suspended until his motion was disposed of or at the very least, until this Court had reviewed the reports and determined whether there had been a violation under Gardner, supra. However, on April 26, 1979, this Court issued its opinion affirming appellant's conviction with no mention, whatsoever, of the possible Gardner violation. Counsel for appellant, upon receiving this opinion, checked his file and then checked this Court's file to determine what action, if any, had been taken pursuant to his motion. Upon reviewing this Court's file, counsel for appellant could find no action taken on his motion, no pre-sentence investigation or psychiatrical reports, and by checking the Clerk's docket, could find no indication that any such reports had been furnished to the Court. This Court's records do contain a letter from someone stating that they had no pre-sentence investigation report on appellant. This, however, does not mean that such a report was not prepared and certainly does not explain the trial judge's

emphatic response that he had reviewed such a report. Appellant would contend that such facts warrant a full hearing at the trial level to determine exactly what happened to the pre-sentence investigation report and to determine exactly what the trial judge considered at sentencing that was not furnished to appellant or his trial counsel. Since Gardner, supra, seems to require not only a disclosure of such a pre-sentence investigation report but also a review of that report by this Court, it is essential that the report be provided as ordered by the trial judge. Until a determination has been made by the trial court on this matter, all proceedings in this case should be stayed and this Court should withdraw its opinion of April 26, 1978, pending a full review of the possible Gardner violation.

B. Secret Psychological Report Ordered By This Court

It must also be noted here in appellant's petition for rehearing that while reviewing this Court's record on appeal in this case, counsel for appellant found a copy of a letter from this Court to the Department of Offender Rehabilitation requesting a copy of the latest psychological report pertaining to the appellant. No copy of this letter was ever furnished to counsel for appellant. Counsel for appellant is aware that the Florida State Prison conducts psychological screening reports on all new inmates. Counsel for appellant also has personal knowledge that in other death cases pending before this Court, that this Court has requested and received such psychological reports without appellate counsel being notified. Upon finding a copy of this letter in the Court file, counsel for appellant attempted to determine if this Court had received such a report but counsel was informed that after the Gardner decision, all death cases were "purged" of such

information.

Under these circumstances, counsel for appellant would request that this Court conduct a full hearing of its own to determine whether or not the psychological screening report was received and the date on which it was received by this Court, when and under whose direction that report was destroyed, and whether or not that report was read and considered by any members of this Court.

Counsel for appellant feels that he must raise this question in his petition for rehearing in order to avoid any waiver of his client's rights. It is apparant, however, that this Court's actions have raised a question that must be resolved pursuant to Gardner, supra, to determine whether the death sentence was imposed on appellant, at least in part, on the basis of a record containing information of which he had no knowledge or opportunity to deny or explain.

It is clear that any secret report is not permissible in death penalty proceedings and violates the process which the defendant is due in such cases. See Gardner, supra, at page 360. Review by this Court is clearly part of the procedure employed in this state for determining which persons receive the death penalty. As noted by Justice White in his concurrence Gardner, supra, at 364:

> "A procedure for selecting people for the death penalty which permits consideration of such secret information relevent to the 'character and record of the individual offender,' . . . [Woodson v. North Carolina, 428 U.S. at 304], fails to meet the 'need for reliability in the determination that death is the appropriate punishment' which the Court indicated was required in Woodson, supra, at 305."

It should also be noted that if psychological reports were before the Court in any other cases then

Gardner is applicable. As pointed out in Gardner, supra, at 361:

> "Since the state must administer its capital sentencing procedures with an even hand, see Proffit v. Florida, 428 U.S., at 250, it is important that the record on appeal disclosed to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed. Without full disclosure of the basis for the death sentence, the Florida Capitol Sentencing Procedure would be subject to the defects which resulted in the holding of unconstitutionality in Furman v. Georgia."

C. Allowing Opinion Which Reaches The Ultimate Issue Being Determined To Be Offered By Jury To Prosecutor.

Concerning this Court's opinion filed on April 26, 1977, in the above styled cause, counsel for appellant would respectfully point out that by determing that the State Attorney could give his opinion as to aggravating and mitigating circumstances present, this Court not only failed to point out what rule of evidence allowed such testimony, it also failed to recognize that by making such a ruling it was overturning long-standing case law on the subject. As recently as this year, the Second District Court of Appeal had pointed out in Mills v. State, 367 So.2d 1068, 1069 (Fla. 2nd DCA, 1979) that:

> "A non-expert witness may not express opinions or conclusions which the jury could draw from the facts to which he had testified."

Moreover, the court in Mills pointed out that such error was clearly reversible because the opinion dealt with the ultimate issue to be decided.

In the sentencing portion of a death case, the ultimate issue to be determined by the jury is what aggravating and mitigating circumstances exist and whether or not the aggravating circumstances outweigh the mitigating circumstances. By allowing the

State Attorney's opinion testimony on the ultimate issue to be decided this Court has either: (1)overruled the long-standing case law pertaining to such testimony or (2) determined that error which would otherwise be reversible in other types of criminal cases is not reversible in a death case.

D. Allowing Testimony To Negate Mitigating Factors.

In determining that it was proper for the State Attorney to take the stand and testify at the second sentencing hearing, this Court stated at page three of its opinion:

> "The state sought to present this testimony in order to counter any inference, unfavorable to the state's case on this issue of sentence, that the jury might draw from being informed of the final disposition of the charges against the accomplice. The testimony also tended to negate various statutory mitigating circumstances. We hold that the state attorney's testimony was relevent for these purposes and was properly admitted." (emphasis added)

After finding that it was proper for the State Attorney to testify in order to negate various mitigating circumstances, this Court goes on to find at page three:

> "We find further from the record that there was no evidence tending to establish the existence of any mitigating factors. The sentence of death was proper."

Counsel for appellant is in a quandary as to why, if there were no mitigating factors, would the State Attorney be allowed to testify to negate them. On the other hand, if the State Attorney had to be allowed to testify to negate mitigating factors, then evidence of mitigating factors must have been present that the jury could have considered. It appears as if the decision allows the State to have its cake and eat it too. The problem can be resolved in one of two ways, either by finding that no mitigating factors

existed, thus requiring a new sentencing proceeding wherein the State Attorney would be prohibited from testfying, or, in the alternative, by finding that mitigating factors did exist, in which case a new sentencing hearing is required based on the fact that this Court had ruled out but all two of the aggravating factors argued below. See Elledge v. State, 346 So.2d 998 (Fla. 1977).

The State Attorney's testimony raises an additional problem when this Court allows the State to negate mitigating factors that the Court finds do not exist. If this Court allows its decision to stand, the state will hereafter be allowed to argue at sentencing proceedings the absence of mitigating factors. Such a ruling directly conflicts with this Court's decision in Mikenas v. State, 367 So.2d 606 (Fla. 1978). In that decision, this Court held that it was error for the trial judge to consider a non-statutory aggravating circumstance which was the antithesis of a mitigating circumstance. In so doing, this Court declared that it was improper to consider the lack of a mitigating circumstance as an aggravating circumstance. In this instant case, to allow the State to negate mitigating factors which this Court determined do not exist, is the same as allowing the State to argue the lack of mitigating factors as an aggravating factor. This is in direct conflict with Mikenas.

E. Erroneous Resolution Of Aggravating/Mitigating Issues.

Finally, counsel for appellant would urge that this Court's elimination of all but two aggravating circumstances requires that appellant be remanded to trial court for a new sentencing proceeding. Obviously, the State and this Court believe that there was

sufficient evidence of mitigating factors present as shown by the fact that the State was permitted to present the State Attorney's testimony to negate those factors. Indeed, the testimony of Dr. McMahon, alone, was sufficient to give the jury reason to find one mitigating circumstance, that of impairment of appellant's capacity to appreciate the criminality of his conduct. See Shue v. State, 366 So.2d 387 (Fla. 1978). This Court cannot stand as the trier of fact and determine that the sentencing jury did not consider Dr. McMahon's testimony of appellant's mental state as establishing a mitigating factor to be wieghted against the aggravating factors presented, since no specific findings were returned by the jury. As pointed out by this Court in Shue v. State, supra:

> "It is impossible to say that there was no reasonable basis for the jury to have concluded that some mitigating circumstances existed sufficient to outweight the aggravating circumstances."

Furthermore, as the United States Supreme Court has pointed out in Lockett v. Ohio, ___ U.S. ___, 98 S.Ct. ___, 57 L.Ed.2d 973, 990 (1978):

> . . . "The Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."

In the instant case it is entirely possible that the jury considered at least one mitigating circumstance to be weighted against the several aggravating circumstances presented by the State because evidence of such a mitigating factor was presented to them. Since this Court has corrected the trial court to show that only two aggravating factors could have existed, the aggravating and

mitigating factors must now be placed back before the jury to determine if the mitigating factors now outweight the aggravating.

WHEREFORE, appellant prays this Court will grant re-hearing in this case, require hearings on the Gardner issues presented, and remand this case for a new sentencing proceeding in accordance with this Court's findings relating to the aggravating and mitigating circumstances present.

Respectfully submitted,

THEODORE E. MACK
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing motion was furnished by hand-delivery to the Honorable Jim Smith, Attorney General, the Capitol Building, Tallahassee, Florida, on this 10th day of May, 1979.

THEODORE E. MACK

Charles Dwight MESSER, Appellant,

v.

STATE of Florida, Appellee.

No. 49780.

Supreme Court of Florida.

Nov. 8, 1979.

On Rehearing June 5, 1980.

Appeal was taken from death sentence imposed by the Circuit Court, Santa Rosa County, Clyde B. Wells, J. The Supreme Court held that: (1) a hearing held to determine whether death sentence was imposed in consideration of any information not disclosed to defendant was critical stage of criminal proceedings at which defendant was entitled to be represented by counsel, and (2) public defender was directed to represent defendant at further hearing on remand.

Order accordingly.

1. Criminal Law ⇐641.3

A hearing held to determine whether a sentence of death was imposed in consideration of any information not disclosed to defendant was critical stage of criminal proceedings at which defendant was entitled to be represented by counsel.

2. Criminal Law ⇐1077.3

When Supreme Court, during pendency of appeal from judgment imposing sentence of death, orders hearing on issue of whether sentence was imposed in consideration of any information not disclosed to defendant, such hearing is part of appellate process and it is proper for appointed appellate counsel to represent defendant at such hearing.

Theodore E. Mack, Asst. Public Defender, Tallahassee, for appellant.

Jim Smith, Atty. Gen., and Wallace E. Allbritton, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

The decision and opinion rendered by the Court on April 26, 1979, are withdrawn.

This case was previously before the Court on appeal. Art. V, § 3(b)(1), Fla.Const. The sentence of death was vacated and the case remanded for a second sentencing trial. *Messer v. State*, 330 So.2d 137 (Fla.1976). The second sentencing proceeding resulted in a sentence of death and this appeal followed.

Subsequently, following the decision in *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), this Court issued an order on June 16, 1977, requiring the trial judge to state whether he imposed the death sentence in consideration of any information not known to the appellant and to furnish this Court with any presentence investigation reports and other reports which were before him for consideration in imposing sentence.

On September 26, 1977, the trial judge filed a response stating that at sentencing he had before him a presentence investigation report and that it contained no information not known to the appellant at the time of sentencing. The response did not state whether a copy of the report was furnished to the appellant, nor was it accompanied by a copy of the report when filed with this Court.

Previously, on March 30, 1977, this Court had ordered the Parole and Probation Commission to furnish a copy of the presentence investigation report. The Commission's response of April 5, 1977 stated that it had no record of a presentence investigation conducted on the appellant.

A communication from the Clerk of the Circuit Court for Santa Rosa County, dated October 11, 1977, states that all reports before the court at sentencing were transmitted to this Court with the record on appeal. It specifically states that there was no presentence investigation ordered.

The appellant has moved that we require clarification of the trial judge's response to our *Gardner* order. In light of the above-

recited facts, we have decided that a clarification is necessary.

The trial court is directed to hold a hearing to determine whether the sentence of death was imposed in consideration of any information not disclosed to appellant or any reports not furnished to him prior to sentencing. The court will report its findings to this Court within sixty days of receipt of this order.

It is so ordered.

ENGLAND, C. J., and ADKINS, BOYD, OVERTON and SUNDBERG, JJ., concur.

On Rehearing

PER CURIAM.

The Court having considered the trial judge's response to our November 8, 1979, order directing a hearing on the question of a possible violation of the rule of *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), and the appellant's motions in reference thereto, it is hereby concluded and adjudged that:

[1] A hearing held to determine whether a sentence of death was imposed in consideration of any information not disclosed to the defendant is a critical stage of the criminal proceedings, at which the defendant is entitled to be represented by counsel.

Therefore, the trial court erred in concluding that there was no need for the appellant to have legal representation at the hearing.

[2] When this Court, during the pendency of an appeal from a judgment imposing a sentence of death, orders a hearing on the issue of whether the sentence was imposed in consideration of any information not disclosed to the appellant, such hearing is a part of the appellate process and it is proper for appointed appellate counsel to represent the appellant at such hearing.

The trial court shall hold a further hearing to determine whether the sentence of death was imposed in consideration of any information not disclosed to the appellant or any reports not furnished to him prior to sentencing, and the Public Defender of the Second Judicial Circuit is hereby directed to represent the appellant at the hearing.

It is so ordered.

ENGLAND, C. J., and ADKINS, BOYD, OVERTON, SUNDBERG, ALDERMAN and McDONALD, JJ., concur.

INTERNATIONAL PAPER CO., Petitioner,

v.

Oscar McKINNEY, Respondent.

No. 55995.

Supreme Court of Florida.

May 29, 1980.

Employer sought a writ of certiorari to quash an order of the Industrial Relations Commission awarding attorney fees. The Supreme Court, Adkins, J., held that where employer initially controverted the claim to temporary disability but paid the claim as ordered, and when employee reached maximum medical improvement employer voluntarily paid permanent disability, employee's attorney was not entitled to additional attorney fees based upon the permanent benefits obtained.

Order quashed; cause remanded with instructions.

1. Workers' Compensation ⇐1981

Where employer initially controverted employee's claim to temporary disability, claim was allowed and claimant's attorney was awarded fee, employer paid temporary disability as ordered, when employee reached maximum medical improvement employer voluntarily began payment of per-

NO 81 5944

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

CHARLES DWIGHT MESSER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RECEIVED
DEC 28 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

CHARLES DWIGHT MESSER, petitioner in the above-styled cause, hereby moves this Court, by his undersigned counsel, for leave to proceed in forma pauperis and in support hereof shows as follows:

1. An affidavit signed by petitioner is attached hereto, wherein petitioner sets forth the fact that he is indigent and unable to pay or give security for the fees and costs attendant to this proceeding.

2. Petitioner was adjudged insolvent for the purpose of appeal in the Supreme Court of Florida and was represented there by appointed counsel.

WHEREFORE, it is respectfully requested that petitioner be permitted to proceed in forma pauperis in this matter.

Respectfully submitted,

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER
Assistant Public Defender
Second Judicial Circuit
P. O. Box 671
Tallahassee, Florida 32302
(904) 488-2458

Counsel for Petitioner

(Member of the Bar of this Court)

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

CHARLES DWIGHT MESSER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RECEIVED
DEC 28 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

I, CHARLES DWIGHT MESSER, being duly sworn, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

1. I am the petitioner in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am incarcerated and receive no income from earnings.

3. I am unable to give security for said cause.

4. I believe that I am entitled to the redress I seek in said cause.

Charles Dwight Messer
CHARLES DWIGHT MESSER

STATE OF FLORIDA

COUNTY OF BRADFORD

The foregoing affidavit of CHARLES DWIGHT MESSER was subscribed and sworn to before me this 3 day of Nov, 1981.

J W Warren
NOTARY PUBLIC, STATE OF FLORIDA

MY COMMISSION EXPIRES:

NOTARY PUBLIC, STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES OCT. 4, 1982

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion for Leave to Proceed in Forma Pauperis has been furnished by U.S. mail to the Honorable Alexander L. Stevas, Clerk of the United States Supreme Court, First and Maryland Avenue, Northeast, Washington, D.C. 20543; Mr. Charles Dwight Messer, #025822, Florida State Prison, P. O. Box 747, Starke, Florida, 32091; and by hand delivery to Honorable Sid White, Clerk of the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida; and the Honorable Jim Smith, Attorney General, The Capitol, Tallahassee, Florida; on this 23 day of December, 1981.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER

81 5944

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Honorable Jim Smith, Attorney General, The Capitol, Tallahassee, Florida and to Mr. Charles Dwight Messer, #025822, Florida State Prison, P. O. Box 747, Starke, Florida 32091, this 23 day of December, 1981.

P. DOUGLAS BRINKMEYER
Assistant Public Defender
Second Judicial Circuit
P. O. Box 671
Tallahassee, Florida 32302
(904) 488-2458

RECEIVED
DEC 28 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 81-5944

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CHARLES DWIGHT MESSER,

Petitioner,

-v-

STATE OF FLORIDA,

Respondent.

_____/

RECEIVED

JAN 23 1982

OFFICE OF THE CLERK
SUPREME COURT, U.S.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

JIM SMITH
Attorney General

WALLACE E. ALLBRITTON
Assistant Attorney General

COUNSEL FOR RESPONDENT

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No. 81-5944

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CHARLES DWIGHT MESSER,

Petitioner,

-v-

STATE OF FLORIDA,

Respondent.

/

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Florida is reported at 403 So.2d 341 (Fla. 1981).

JURISDICTION

Respondent has no quarrel with the jurisdiction of this Court pursuant to Title 28, United States Code, § 1257(3), or any other provision thereof, at least for the purpose of determining whether to decline assumption thereof.

QUESTIONS PRESENTED

I.

WHETHER THE FLORIDA SUPREME COURT ERRED IN AFFIRMING THE IMPOSITION OF THE DEATH SENTENCE UPON PETITIONER BECAUSE THE STATE ATTORNEY WAS PERMITTED TO TESTIFY AS TO THE REASONS UNDERLYING HIS EXERCISE OF PROSECUTORIAL DISCRETION.

II.

WHETHER THE FLORIDA SUPREME COURT'S AFFIRMANCE OF THE IMPOSITION OF THE DEATH SENTENCE UPON PETITIONER WAS ERROR ON THE GROUND THAT THE TRIAL JUDGE CONSIDERED AN INVALID AGGRAVATING CIRCUMSTANCE WHRRE THERE WERE OTHER VALID AGGRAVATING CIRCUMSTANCES SUFFICIENT TO JUSTIFY THE IMPOSITION OF THE DEATH PENALTY.

III.

WHETHER THE FLORIDA SUPREME COURT ERRED IN AFFIRMING PETITIONER'S DEATH SENTENCE ON THE GROUND THAT THE COURT FAILED TO DETERMINE WHETHER EX PARTE INFORMATION RELATING TO PETITIONER HAD BEEN RECEIVED AND REVIEWED BY THE COURT DURING ITS APPELLATE REVIEW PROCESS.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the constitutionality of a death sentence imposed pursuant to Section 921.141, Florida Statutes (1973), which is set forth in Appendix D. This case involves the Fifth, Sixth, and Fourteenth Amendments to the federal constitution.

STATEMENT OF THE CASE

Respondent has no quarrel with petitioner's statement of the case and accepts same as set forth in his petition on pp. 1, 2 thereof.

ARGUMENT

I.

THE FLORIDA SUPREME COURT DID NOT ERR IN AFFIRMING PETITIONER'S DEATH SENTENCE ON THE GROUND THAT THE TRIAL JUDGE IMPROPERLY PERMITTED THE STATE ATTORNEY TO TESTIFY AS TO THE REASONS UNDERLYING HIS EXERCISE OF PROSECUTORIAL DISCRETION.

The Florida Supreme Court has previously affirmed petitioner's conviction for first degree murder and robbery. Messer v. State, 330 So.2d 137 (Fla. 1976). However, the court

vacated the death sentence and remanded for a new sentencing proceeding before a jury. In so doing, the court commented as follows:

> It is our conclusion that the trial court erred in application of the statute in two particulars. First, although there is evidence in the record of the plea-bargained second degree murder sentence received by appellant's accomplice Brown, appellant was not permitted, during the sentencing portion of the trial, to submit this evidence to the jury. We believe the jury was entitled to know that the codefendant, Ronnie Brown, negotiated a plea of guilty to second degree murder and was sentenced to 30 years imprisonment. See Slater v. State, 316 So.2d 539 (Fla. 1975). Although the Slater case, supra, involved evidence that the "trigger man" was permitted to negotiate a plea for a sentence of life imprisonment, under the facts of this particular case we believe the reasoning of Slater applies with equal force. It was there stated, "Defendants should not be treated differently upon the same or similar facts." In the instant case, although the appellant did fire the shot into the head of the victim, this shooting occurred after Brown took a wallet containing $120 and a watch from the victim, then struck him in the back of the head. There is little to separate out the joint conduct of the co-defendants which culminated in the death of the decedent. [Emphasis ours.]

Id. at 141, 142. When Mr. Golden was called to testify for the state at the sentencing hearing, defense counsel objected (App. G-1). His objection was premised on the theory that it was perfectly permissible for Mr. Golden to give his reason for the negotiated plea with petitioner's accomplice but that this must be done by introducing evidence as to his reasons, rather than testifying as to those reasons. It appears to respondent that this is a distinction without a difference. When Mr. Golden testified under oath, he was, in truth, "introducing evidence" as to his reasons in exercising his prosecutorial discretion. There was some hassling between the trial judge and defense counsel on this issue as the judge was seeking to understand the basis of

defense counsel's objection. Finally, Judge Wells remarked as follows:

> JUDGE: Well, it appears to me that Mr. Golden would have the same right or responsibility to tell the basis upon which he accepted that negotiated deal as he did in making the deal to start with. The court has cast upon us the burden to require the jury to hear that evidence, i.e., that the co-defendant did get a negotiated deal, and so in furtherance of that evidence I think it is incumbent upon this court to hear the reason why, and since Curtis Golden apparently made that decision then I think it is incumbent upon him to tell the jury why he made it, and let them weigh that along with the other. So, I would allow it to be made.

(App. G-4)

In reversing for a new sentencing hearing, the Florida Supreme Court quoted its prior decision in Slater v. State, 316 So.2d 539 (Fla. 1975), for the principle that defendants should not be treated differently upon the same or similar facts. This being so, the only way the jury could learn of all the facts surrounding the state attorney's agreement to accept a negotiated plea of guilty from petitioner's accomplice was for him (state attorney) to take the stand and testify as to the facts as he knew them and as they had been made known to him. This is the only way the jury could properly be advised as to why the accomplice, Ronnie Brown, was treated differently upon similar facts.

As previously stated, the Florida Supreme Court pointed out that there was little "to separate out the joint conduct of the codefendants." 330 So.2d, at 142. Based on the principle articulated in Slater v. State, supra, the Florida Supreme Court reversed because the first sentencing jury was not advised as to why the accomplice Brown was treated differently upon similar facts. Now, because the trial judge made every effort to comply with the directions of the Florida Supreme Court by permitting

the state attorney to testify as to those facts which in his opinion justified a different treatment for the accomplice Brown, petitioner claims error.

The testimony of State Attorney Curtis Golden in its entirety is bound together and submitted to this court as Respondent's Appendix. The testimony comprises 65 pages and a review thereof will show that Mr. Golden was subjected to a thorough and exhaustive cross-examination. Everything that Mr. Golden testified to, whether as to facts within his own knowledge or otherwise, was thoroughly challenged in every way possible by counsel for petitioner.

Section 921.141(1), Florida Statutes, provides that at the sentencing hearing, "evidence may be presented as to any matter that the court deems relevant to sentence" and such evidence may be received "regardless of its admissibility under the exclusionary rules of evidence." The statute further provides that defendant is to be given a fair opportunity to rebut any hearsay statements and that the statute should not be construed to authorize the introduction of evidence secured in violation of the constitution, state or federal. Not only was petitioner given a "fair opportunity" to rebut any alleged hearsay testimony given by State Attorney Golden, he was given every opportunity to do so. The sentencing hearing before the trial judge was a plenary hearing. Fourteen witnesses testified and petitioner had every opportunity to rebut, deny, or explain any testimony that he desired to challenge. This he did not do. In fact, as respondent read his brief filed with the Florida Supreme Court, he did not contend that he was never given a "fair opportunity" to rebut any alleged hearsay testimony given by any witness. Neither did his brief urge that there was evidence introduced at the hearing that had been seized in violation of the Constitution of the United States or the State of Florida. The Florida

Supreme Court in construing subsection 921.141(1), Florida Statutes, held that a "circuit judge should exercise the broadest latitude in admitting evidence during the sentencing portion of the jury's deliberations." 330 So.2d, at 142. The case of Alvord v. State, 322 So.2d 533 (Fla. 1975), well illustrates the broad discretion granted trial judges in this area. There, the error complained of was the permitting of a Dr. Robey to testify in the penalty phase of the trial that the defendant was sane at the time he committed a rape in the State of Michigan. In disposing of this contention, the Florida Supreme Court remarked as follows:

> In the penalty proceedings certain types of evidence which may be inadmissible in a trial on guilt may be admissible and relevant to enable the jury to make an informed recommendation based on the aggravating and mitigating circumstances concerning the acts committed. In fact, one of the statutory mitigating circumstances is the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. Fla.Stat. §921.141 (6)(f), F.S.A. There should not be a narrow application or interpretation of the rules of evidence in the penalty hearing, whether in regard to relevance or to any other matter except illegally seized evidence. State v. Dixon, supra. See also Sullivan v. State, 303 So.2d 632 (Fla. 1974), and Smith v. State, 303 So.2d 694 (Fla. App.1st, 1974). This testimony was properly allowed into evidence.

Id. at 538, 539.

In the case at bar, the Florida Supreme Court reversed for a new sentencing hearing simply because the jury was not properly advised that petitioner's accomplice, Ronnie Brown, had been permitted to enter a plea of guilty to second degree murder and the circumstances which justified the state attorney in accepting this negotiated plea. Now, all of these facts were brought to the attention of the jury via Mr. Golden's testimony and petitioner still claims that he has been deprived of several, if

not all, of his constitutional rights. As respondent reads petitioner's argument, it seems that he agrees, as he must, that Brown's negotiated plea of guilty to second degree murder was properly placed before the jury. However, he strenuously objects to the testimony of Mr. Golden as to those facts and circumstances which justified the state attorney in accepting the negotiated plea of guilty to second degree murder. Frankly, if the state had not presented testimony as to those circumstances which justified a different treatment for Brown than that which was given petitioner, then the state's position would be vulnerable to attack under the teaching of Slater v. State, supra.

At the conclusion of State Attorney Golden's testimony, petitioner through his counsel moved to discharge the jury and have the court to impose a sentence of life imprisonment on the ground that the prosecuting attorney impermissibly exercised arbitrary discretion by permitting the accomplice, Ronnie Brown, against whom the prosecuting attorney had ample evidence of first degree murder, to plead to a lesser offense. The trial judge then asked the question, assuming arguendo that Mr. Golden had abrogated his responsibility in accepting the plea from Brown, how would this affect the sentence to be imposed against petitioner. Petitioner's counsel then backed up and stated that it was not his intention to indicate that Mr. Golden had ever done any violation of a statute or failed to properly exercise his responsibility under the law. Indeed, this is precisely what petitioner's counsel had been arguing and the judge then remarked: "I thought that was what he was arguing?" See Respondent's Appendix, pp. 258, 259. Now then, please note the following:

> FLEMING: That was my point, Your Honor, and I do not suggest misconduct on Mr. Golden's part as elected State Attorney and as the prosecuting attorney. Prosecutors do have discretion ...

JUDGE: How does the discretion which he exercised in one defendant's case mitigate in favor of the other defendant? That's what I'm asking you.

FLEMING: Your Honor, we have shown circumstances here, and the evidence has shown by Mr. Golden's own testimony that these two defendants participated in the same ...

JUDGE: I recognize and accept the fact -- accepting that argumentum -- but take now that he has exercised that discretion against one that is equally guilty with the other -- and assume for the sake of argument that they are equally guilty. How does that mitigate in favor of your defendant? That is what I'm asking you.

FLEMING: Your Honor, it makes Mr. Messer no less guilty of the offense, but what it does do is to point out the arbitrariness with which the death penalty can be applied in this nation of ours -- such arbitrariness that the Supreme Court of the United States has criticized the decision of Furman v. Georgia in which this present statute in Section 921 of the Florida Statutes attempted to alleviate by setting forth specific aggravating and mitigating circumstances by which those enumerated circumstances alone determined which penalty a person was to receive. We have expanded beyond those ennumerated circumstances, Your Honor, and entered into others which the legislature had not permitted, thereby showing, Your Honor, that there are indeed...

JUDGE: Mr. Fleming, you are arguing the same thing that has been argued before the Florida Supreme Court as the basis for declaring the statute unconstitutional. The court has ruled that it is constitutional, and your purpose in being here today is for the jury to hear the mitigating and aggravating circumstances. I am going to deny your motion.

(The jury, which had been removed from the courtroom during the argument on this motion, was returned to the jury box.)

(Respondent's App. 260, 261) It is noted that petitioner's counsel was never able to answer the trial judge's question as to just how any improper exercise of prosecutorial discretion by State Attorney Golden would affect the sentence to be imposed on petitioner. This was also noted by the Florida Supreme Court

when it handed down its decision in Messer v. State, 403 So.2d 341 (Fla. 1981). Note the following:

> The sentencing judge asked defense counsel to explain why the state attorney's exercise of discretion with regard to the case against Brown, whether it was proper or improper, had anything at all to do with the question of what sentence should be imposed upon Messer. After further argument, the court denied the motion.

Id. at 347.

It is respectfully submitted that the reasons given by State Attorney Golden in support of the exercise of his prosecutorial discretion has nothing whatever to do with the determination of sentence imposed on petitioner. After all, this case was reversed in the first instance (330 So.2d 137) so that petitioner could place before the jury in the penalty phase of the trial the fact that his accomplice had been permitted to enter a plea of guilty to the lesser included offense of second degree murder. If the record had been permitted to stand in that fashion, then we would have two defendants with little to distinguish between their culpablity receiving disparate sentences. This is not permitted under Florida law and would be vulnerable to attack under the teaching of Slater v. State, supra. This is precisely the reason why the prosecution desired to make a matter of record the reasoning of State Attorney Golden for exercising his prosecutorial discretion in such a manner.

Hence, the Florida Supreme Court properly concluded as follows:

> In his initial appeal of his conviction and sentence, Messer successfully maintained that he should have been allowed to tell the jury that Brown had been allowed to plead guilty to second degree murder and had received a thirty-year sentence. Messer v. State, 330 So.2d 137 (Fla. 1976). We hold that it was within the discretion of the trial court to allow the state to explain to

> the jury through the testimony of the state attorney, the reasons for the seemingly disparate treatment.

Messer, 403 So.2d, at 349.

II.

WHETHER THE FLORIDA SUPREME COURT'S AFFIRMANCE OF THE IMPOSITION OF THE DEATH SENTENCE UPON PETITIONER WAS ERROR ON THE GROUND THAT THE TRIAL JUDGE CONSIDERED AN INVALID AGGRAVATING CIRCUMSTANCE WHERE THERE WERE OTHER VALID AGGRAVATING CIRCUMSTANCES SUFFICIENT TO JUSTIFY THE IMPOSITION OF THE DEATH PENALTY.

The Florida Supreme Court rejected petitioner's argument under this point as follows:

> The only error we find in the judge's consideration of the circumstances of the crime is that the finding that the murder was committed in the course of a robbery and the finding that it was committed for pecuniary gain both relate to the same aspect of the crime. Provence v. State, 337 So.2d 783 (Fla. 1976), cert. denied, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). This error, however, was harmless. Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert. denied, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979).

In Hargrave v. State, 366 So.2d 1 (Fla. 1979), the Florida Supreme Court reasoned as follows:

> We deal first with the aggravating circumstances. Although Provence v. State, 337 So.2d 783 (Fla. 1976), condemns the doubling up of the aggravating circumstances of pecuniary gain each time a crime such as robbery is concerned, the mere recitation of both circumstances does not in all cases call for a condemnation of the sentencing hearing and judgment. As State v. Dixon, supra, teaches us, the statute does not comprehend a mere tabulation of aggravating versus mitigating circumstances to arrive at a net sum. It requires a weighing of those circumstances. Absent the circumstance of pecuniary gain, there were ample other statutory aggravating circumstances to place on the scale to weigh against the valid mitigating circumstances.

Id. at 5.

In the instant case, if we exclude the aggravating circumstance of pecuniary gain [§ 921.141(5)(f), Fla.Stats.], then there is left remaining three valid aggravating circumstances, the validity of which is not challenged. First, the trial judge found that the murder was committed while petitioner was in the process of committing the crime of robbery; secondly, the murder was committed in a manner which the trial judge found to be especially atrocious and cruel; and petitioner had been previously convicted of a felony involving the use or threat of violence to the person, i.e., manslaughter. All three are valid aggravating circumstances under Florida's present capital sentencing statute (921.141) and were so at the time petitioner was convicted. Please see petitioner's appendix D-1.

But the foregoing notwithstanding, it is vehemently urged to this Court that the decision of the Florida Supreme Court sub judice directly conflicts with that of the Fifth Circuit Court of Appeals in Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), modified, 648 F.2d 446 (5th Cir. 1981), cert. granted, 50 U.S.L.W. 3244 (U.S. Oct. 5, 1981) (No. 81-89). We disagree. In Stephens, a Georgia jury sentenced a habeas corpus petitioner to death based on a number of aggravating circumstances, including one circumstance later held unconstitutional. 631 F.2d, at 405, 406. Because it was impossible for the reviewing court to determine the extent of the impact of the unconstitutional circumstance on the jury's verdict--i.e., whether the jury would have voted to impose the death sentence absent the invalid circumstance--the Fifth Circuit struck down the sentence. Id. at 406.

The focus of the Stephens case was the impossibility of rational review of the Georgia jury's actions, and that decision did not forge a rigid rule rendering unconstitutional the imposition of the death penalty in all cases in which invalid

aggravating circumstances are considered by the sentencing authority. The Georgia statute involved in Stephens differs from the Florida sentencing statute. For example, under the Georgia statute involved in Stephens, the jury was not required to state what mitigating circumstances, if any, were considered; by contrast, under Florida law the trial judge was at the time of Messer's sentencing (and is today) required to prepare written findings reciting both aggravating and mitigating circumstances. The Florida Supreme Court has repeatedly held that reversal of death sentences is not required merely because invalid aggravating circumstances are considered, even when coupled with a mitigating circumstance, so long as it can be known that the result of the weighing process would not have been different had the impermissible factors not been present. Brown v. State, 381 So.2d 690 (Fla. 1980); Armstrong v. State, 399 So.2d 953 (Fla. 1981). It is submitted that Stephens does not impinge upon this rule.

But beyond being distinguishable from Florida death penalty procedures, it is submitted that the underpinning of Stephens is shaky at best. Let's revisit Stephens for a few minutes. There, the Fifth Circuit relied primarily on the authority of Stromberg v. California, 283 U.S. 359 (1931), Accord, Bachellar v. Maryland, 397 U.S. 564 (1970), Street v. New York, 394 U.S. 576 (1969), Yates v. United States, 354 U.S. 298 (1957), in vacating the death penalty. In Stromberg, supra, at 367-68, this Court noted that where there was a general verdict of guilty, which could have rested on three grounds, one of which was unconstitutional, it was impossible to tell on which ground the verdict rested and the conviction had to be set aside. Similarly, Bachellar v. Maryland, supra, Street v. New York, supra, and Yates v. United States, supra, all involved general verdicts of guilty, each of which could have been based on an unconstitutional ground.

Respondent agrees that if the penalty verdict in Stephens' trial had been, for example, "[w]e the jury find an aggravating circumstance to exist and recommend the death penalty," then the penalty verdict would have to be set aside. What is manifestly clear is that the penalty verdict in Stephens' trial was not a general verdict. The jury found three aggravating circumstances, one of which was later declared to be unconstitutional. However, the Fifth Circuit stated that as to the two other aggravating circumstances there was no uncertainty as to either of them and either of them would be legally sufficient for the jury to impose the death penalty.

The Georgia Supreme Court has held that even if the finding of some aggravating circumstances must be set aside, the death penalty will be upheld if there still exists one aggravating circumstance. Burger v. State, 265 S.E.2d 797 (Ga. 1980); Gates v. State, 261 S.E.2d 349 (Ga. 1979). This Court denied certiorari in both of these cases. Burger v. Georgia, 446 U.S. 988 (1980); Gates v. Georgia, 445 U.S. 938 (1980). Concurring in the denial of certiorari in Westbrook v. Balkcom, ___ U.S. ___, 101 S.Ct. 541, 66 L.Ed.2d 298 (1980), Justice Stevens remarked as follows:

> The Georgia Supreme Court...decided to adhere to its prior position that a death penalty imposed on the basis of a plurality of aggravating circumstances, each of which has been established beyond a reasonable doubt, will not be set aside simply because one of these aggravating circumstances is vulnerable.... [T]he Georgia Supreme Court's position is clear, and...I consider it consistent with this Court's decisions.

66 L.Ed.2d, at 298.

It is unmistakable that the decision of the Fifth Circuit to vacate Stephens' death penalty conflicts with well-settled Georgia law declaring prior non-capital convictions admissible during the penalty phase of a death case; it conflicts with the

reasoning of this Court in Gregg v. Georgia, 428 U.S. 153, 161-62 (1976); it conflicts with Justice Stevens' concurring opinion in Westbrook v. Balkcom, supra; and it certainly conflicts with this Court's decision to deny certiorari in Burger v. State, supra; and Gates v. State, supra. In sum, Stephens falls far short of requiring the vacation of petitioner's death sentence.

Contrary to petitioner's conjectural suppositions, the trial judge in reviewing the evidence presented at the sentencing hearing found no mitigating circumstances. In so doing, the trial judge remarked as follows:

> f. The Court has reviewed those mitigating circumstances contained in Section 921.141(6)(a) through (g), and finds that none of those mitigating circumstances are present. In making this finding, the Court has considered the testimony of the two clinical psychologists and the psychiatrist who testified, none of whom diagnosed the Defendant to have been suffering any extreme mental or emotional disturbance at the time of the commission of the offense.

(App. F-3,4) Consequently, there is no fear that a valid mitigating circumstance was offset by a consideration of an improper aggravating circumstance.

Respondent believes that the sole significance of statutory aggravating circumstances is to determine, at the threshold of the sentencing deliberation, whether the death penalty may be imposed; the sentencing authority must review the evidence before it and conclude whether any of the statutory categories is present. As pointed out in Gregg v. Georgia, supra, at 188-198, this requirement serves to "limit" and "channel" the discretion of the jury in making the sentencing decision. Once this determination is made (and assuming that an aggravating circumstance is found), the issue is whether the death penalty should be imposed, and the language of the statutory aggravating circumstances have nothing to do with this

question--rather, this decision is made by the sentencing authority (sub judice, the trial judge) based upon the evidence before it. Since statutory aggravating circumstances operate only to open the door to consideration of the death penalty, and since any one such circumstance will perform this function regardless of the presence or absence of others, then it is believed that the invalidity of any aggravating circumstance considered by the sentencing authority would taint the death sentence in only two circumstances: (1) if the invalid aggravating circumstance was the only aggravating circumstance found (thus entitling the defendant to a lesser sentence as a matter of law); or (2) if the invalid circumstance somehow resulted in the introduction of evidence at the punishment phase which would not otherwise have been admissible.

First, it is emphasized that the improper consideration of one statutory aggravating circumstance had no possible impact upon whether the death penalty could be imposed in the instant case because there remained three valid aggravating circumstances properly considered by the trial judge, either one of which would independently have permitted the consideration of capital punishment as an alternative. In other words, the existence of one valid aggravating circumstance in the absence of any mitigating circumstances will justify the imposition of the death sentence. Armstrong v. State, supra, Sireci v. State, 399 So.2d 964 (Fla. 1981). Second, the improper consideration of one statutory aggravating circumstance by the trial judge had no possible impact upon whether the death penalty should be imposed in this case because it had no effect whatsoever upon the evidence which was before the jury in the penalty phase. Under these circumstances, it cannot reasonably be argued that the consideration of one improper aggravating circumstance together with an additional three admittedly valid statutory aggravating

circumstances violated petitioner's constitutional rights. The Fourteen Amendment guarantee of due process is, in essence, a guarantee of fundamental fairness. See Ingraham v. Wright, 430 U.S. 651, 675 (1977); Donnelly v. DeChristoforo, 416 U.S. 637, 642-643 (1974). It is submitted that fundamental fairness--the integrity of the capital sentencing process--was in no way impaired in the instant case.

III.

WHETHER THE FLORIDA SUPREME COURT ERRED IN AFFIRMING PETITIONER'S DEATH SENTENCE ON THE GROUND THAT THE COURT FAILED TO DETERMINE WHETHER EX PARTE INFORMATION RELATING TO PETITIONER HAD BEEN RECEIVED AND REVIEWED BY THE COURT DURING ITS APPELLATE REVIEW PROCESS.

The thurst of petitioner's argument under this point bears a remarkable similarity to the one presented to the Florida Supreme Court in Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). There, 123 inmates on death row asserted that the Florida Supreme Court had violated their right to due process in the context of appellate review because that court presumably in an unidentified number of cases requested and received information beyond the trial record, thus allegedly violating this Court's decision in Gardner v. Florida, 430 U.S. 349 (1977). Based on this major assertion, it was further contended that they had been denied the right to effective assistance of counsel, denied the right to confrontation, denied their Eighth Amendment right to proportionality in capital sentencing in violation of Proffitt v. Florida, 428 U.S. 242 (1976) and denied their right against self-incrimination and the right of assistance of counsel in exercising said rights. The Florida Supreme Court found their claims wanting. In so doing, the court remarked in pertinent part as follows:

> Turning to the legal issues presented, we perceive that petitioners' several constitutional claims all emanate from their assertion that we have "engaged in

the continuing practice of requesting and receiving information concerning capital appellants which was not presented at trial and not a part of the trial record or record on appeal." . . . The receipt of this information, petitioners assert generally, has led to a rash of constitutional violations ranging from a denial of due process in individual cases where information was received, on the one hand, to a pervasive violation of Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), in all capital cases reviewed and affirmed by the Court, on the other hand. . . .

Despite strident characterizations of our receipt of these materials, and notwithstanding the vigor and pith of the hypotheses on which petitioners depend, the doctrines of constitutional law here argued are singularly unpersuasive. . . .

Florida's death penalty statute, section 921.141, Florida Statutes (1979), directs that a jury and judge, not this Court, must weigh the evidence of aggravating and mitigating circumstances delineated in the statute to determine whether death is an appropriate sentence. . . .

This Court's role after a death sentence has been imposed is "review," a process qualitatively different from sentence "imposition." It consists of two discrete functions. First, we determine if the jury and judge acted with procedural rectitude in applying section 921.141 and our case law. . . .

The second aspect of our review process is to ensure relative proportionality among death sentences which have been approved statewide. . . .

Neither of our sentence review functions, it will be noted, involves weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances. Our sole concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances.

* * * * *

Petitioners' contentions in this proceeding are essentially grounded on Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). Gardner stands for the proposition that a sentence of

death may not be imposed (note the word "imposed") to any extent on non-record, unchallengeable information. Id. at 362, 97 S.Ct. at 1206. Since we do not "impose" sentences in capital cases, Gardner presents no impediment to the advertent or inadvertent receipt of some non-record information. The Kentucky Supreme Court explained the distinction which has eluded petitioners in Ex Parte Farley, 570 S.W.2d 617 (Ky. 1978), responding to the very assertion that is made here concerning the review of "non-record" materials in capital cases:

> Every opinion from a case book, every test or treatise, every law review article, every philosophical, historical or religious document a judge might see fit to read and consider, including the Holy Bible, is a tangible source of information from which he may pick and choose in arriving at a judgment.
>
> * * * * *
>
> There are obviously differences between individualized information pertaining to the defendant personally, which is to be considered by a trial judge in fixing a sentence, and the impersonal data that may be used by an appellate court in determing whether the judgment of a trial court is or is not in line with what has been done in comparable cases.
>
> * * * * *
>
> It seems to us that the difference is quite fundamental. If a judge or jury deciding one's fate is going to consider reports of what other people say about him, certainly he should be entitled to see them. "The risk that some of the information accepted in confidence may be erroneous, or may be misinterpreted, by the investigator or by the sentencing judge, is manifest." Gardner v. Florida, supra, at 430 U.S. 359, 97 S.Ct. 1205. But we are not the sentencing court. In any given case before us we intend to comply with the statutory request to include in our decision a reference to those similar cases that have been taken into consideration. Presumably, however, the petitioners want to know not only what will be taken into consideration, but what will not, and to know it in advance, so that they can urge upon us what to choose and what to avoid.

* * * * *

> We do not find it possible to believe that in Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), the Supreme Court of the United States meant to lay down a principle so pervasive as to require an appellate court to lay out for inspection by the appellant, even in a capital case, all of the information in its hands from which it may seek perspective and guidance in reviewing the propriety of his sentence. We therefore hold that Gardner does not apply.

Id. at 625 27 (footnote omitted).

> It is evident, once our dual roles in the capital punishment scheme are fully appreciated, that non-record information we may have seen, even though never presented to or considered by the judge, the jury, or counsel, plays no role in capital sentence "review." That fact is obviously appreciated by the United States Supreme Court, for it very carefully differentiated the sentence "review" process of appellate courts from the sentence "imposition" function of trial judges in Proffitt and in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).
>
> A remaining question is whether the reading of non-record documents would so affect members of this Court that they could not properly perform their assigned appellate functions. Plainly, it would not. Just as trial judges are aware of matters they do not consider in sentencing, Alford v. State, 355 So.2d 108 (Fla.), cert. denied, 436 U.S. 935, 98 S.Ct. 2835, 56 L.Ed.2d 778 (1978), so appellate judges are cognizant of information that they disregard in the performance of their judicial tasks.
>
> The upshot of this is that petitioners' claims are untenable.

Id. at 1330, 1331, 1332, 1333. This Court denied certiorari. Brown v. Wainwright, ___ U.S. ___ (1981), 30 CrLRep. 4066. See also Foster v. Strickland, 517 F.Supp. 597, 607 (N.D.Fla. 1981), and Ford v. Strickland, ___ F.Supp. ___ (S.D.Fla. 1981), Case No. 81-6663-Civ-MCR, opinion filed December 10, 1981.

It should be noted that petitioner in his pleadings has failed to demonstrate that the Florida Supreme Court either

requested or received or considered any non-record information concerning his appeal. The appendix submitted with petitioner's petition contains no documentation of extra-record information that was or may have been used on petitioner's appeal from his judgment, and more particularly, from the imposition of the death penalty. Moreover, petitioner's attempt to obtain relief on the basis that the rights of others may have been violated must fail because constitutional rights are personal and may not vicariously be asserted. Rakas v. Illinois, 439 U.S. 128 (1978).

Assuming for the moment that Gardner v. Florida, supra, is applicable to appellate reviewing courts, it is submitted that in petitioner's case there has been no allegation that such information was used, always assuming, of course, that it was requested in the first instance. As observed in Gardner, the trial court had information not available to Gardner:

> In those cases in which the accuracy of the report is contested, the trial court can avoid delay by disregarding the disputed material.

51 L.Ed.2d, at 403. Indeed, this Court in denying certiorari in Alford v. State, 355 So.2d 108 (Fla. 1977), cert. denied, 436 U.S. 935, refused to review a case where the trial court had information from a presentence investigation report that was not made available to defendant, but was not used. The Florida Supreme Court in addressing this issue remarked as follows:

> In response to the motion to vacate, the State says that, assuming the judge was "made aware" of certain facts that doesn't mean that he "considered' those facts in imposing sentence. The State draws a distinction between being "aware" of certain facts and "considering" them. We agree. The United State Supreme Court in Gardner recognized the ability of the sentencing judge to disregard material in imposing sentence....

355 So.2d, at 109. See also United States v. Pinkney, 543 F.2d 908 (C.A.D.C. 1976).

Petitioner's assertions of deprivations of constitutional rights are more chimerical than real. How can petitioner be denied due process of law when the sentencing authority (trial judge) utilized no information unavailable to him? Gardner v. Florida, supra, only prohibits the one who imposes sentence from considering factual matters unavailable to the defense. Gardner has never been held to require appellate courts to furnish all their information to a defendant. Indeed, to the contrary, in Ex Parte Farley, 577 S.W.2d 617 (Ky. 1978), the Kentucky Supreme Court had this to say:

> We do not find it possible to believe that in Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), the Supreme Court of the United States meant to lay down a principle so pervasive as to require an appellate court to lay for inspection by the appellant, even in a capital case, all the information in its hands from which it may seek perspective and guidance in reviewing the propriety of his sentence. We therefore hold that Gardner does not apply.

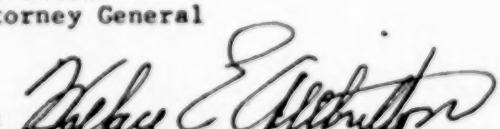
577 S.W.2d, at 627. It is submitted that this Court's pronouncement in Gardner v. Florida, supra, is limited to the trial court, the "imposer" of the sentence. It follows that petitioner's reliance on Gardner is woefully misplaced.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

JIM SMITH
Attorney General

By: 
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No. 81-5944

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CHARLES DWIGHT MESSER,

Petitioner,

-v-

STATE OF FLORIDA,

Respondent.

_____/

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SUPREME COURT, U.S.

RESPONDENT'S APPENDIX

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SHELLEY: I have no further questions of this witness.

(witness excused)

* *

C U R T I S G O L D E N, having been first duly sworn, testified as follows, to wit:

EXAMINATION BY

MR. JOHNSON:

Q Sir, would you state your name, and spell your last name please?

A My name is Curtis Golden. My last name is spelled G-O-L-D-E-N.

Q What is your occupation, Mr. Golden?

A I'm the State Attorney for the First Judicial Circuit.

Q What is the First Judicial Circuit?

A It consists of Escambia, Santa Rosa, Okaloosa and Walton Counties.

Q What are your responsibilities as State Attorney for the First Judicial Circuit?

A My primary responsibility is to investigate criminal offenses and to prosecute all criminal cases arising in the county and circuit courts of the First Judicial Circuit.

Q Did you have that occupation back in 1973?

A I did.

Q Sir, back in November 1973 did you have the occasion to be called to the scene of an unidentified body in Escambia County, Florida?

A I did.

Q How were you notified of that body?

A Mr. Johnson, I don't recall whether I was called by telephone or whether I was called on my car radio. In any event, I was contacted by one or the other types of communication. I was in Escambia County at that time, and I proceeded directly to the scene.

Q Upon arriving at the scene what did you find?

A Well, I found that there were law enforcement officers present, and at that time I observed the body of a white male. He appeared to be in his 20's. Of course, it was obvious at the time in viewing him that he was dead.

Q Where was his body located?

A It was located approximately five miles south of I-10, and it was south of the Stuckey's interchange on I-10, and it was a few yards off of, I believe it's S-191.

Q Is that in Santa Rosa County, sir?

A It is in Santa Rosa County, yes.

Q Sir, after finding that body did you have the occasion to investigate the death of that person?

A I did, yes.

Q How did you proceed in your investigation?

A The Santa Rosa County Sheriff's Office asked me to participate with them in the investigation of the case, and I worked primarily with Lt. Cobb, and he and I first collaborated with Officer Boswell in viewing the crime scene, and we reviewed with him also whatever evidence he had obtained at the crime scene. Then Lt. Cobb and I began a routine investigation of the murder. This involved the location and the questioning of any suspects. I know at one time we checked all the pay telephones along the interstate thinking that possibly the person who had committed the crime was hitchhiking, and after the automobile had been parked they had to leave the scene by some way, so we thought they may have called someone to come after them. We obtained the toll records of all the telephone calls from the pay telephones along the interstate. We checked all the calls out; we talked to people who had made the calls; we talked to people that received the calls. In addition to that we ran down other leads which we had. We had some confidential information on suspects, and we investigated these suspects. This continued over a period of several months. I believe it was two or three months.

Q How many hours did you spend on the investigation with

the other officers up to this point in time?

A Mr. Johnson, all told there were thousands of hours -- man hours -- devoted to this investigation by the Santa Rosa County Sheriff's Department as well as my office.

Q Sir, in mid-January 1974, did you have occasion to receive some information about an individual who might have some information about this murder?

A I did.

Q How did you receive this information, sir?

A This information came to me from the Santa Rosa County Sheriff's Office. It came to them from the Florida Department of Criminal Law Enforcement, and it came to them from the Alabama State Police.

Q Sir, upon receiving this information, how did you proceed with the investigation?

A Lt. Cobb and myself and Agent Cornelius with the Florida Department of Criminal Law Enforcement drove to Anniston, Alabama. The information we had was that a subject was in custody in Alabama who had information relating to the murder. We proceeded to Anniston. Upon arrival we were briefed by the sheriff and by Capt. Davis of the Alabama State Police, as well as Wayne Mannis, an F.B.I. agent. After being briefed on the situation by them we then interviewed the Defendant Charles Wesser.

Q Do you recall when you conducted this initial interview with Mr. Messer?

A Yes, sir. I believe it was on January 17, 1974, and it was somewhere in the afternoon somewhere around 4:00 to 4:12 P.M.

Q And where was this interview conducted, sir?

A It was conducted at the Sheriff's Office in Anniston, Alabama.

Q Who was present during this interview?

A There was myself, Lt. Cobb, Capt. Davis, Officer Perry Cantrell with the Anniston City Police Department, and Agent Wayne Mannis with the F.B.I. Also, Agent Ronnie Cornelius with the Florida Department of Criminal Law Enforcement.

Q Mr. Golden, what was the first thing you advised the defendant when you had your interview with him?

A The first thing I did was to advise him of his constitutional rights. But I might state, prior to that time, Mr. Johnson, that the defendant informed me at that time -- when I first arrived and entered the room -- that he had knowledge of a murder which occurred on the interstate somewhere in Florida, and he told me that while he did not participate in the murder, that he was present when it was committed, and he asked me to grant him immunity in return for his telling me

about it, and I informed him at that time that I could not do that because I did not know what he was going to tell me, and I did not know at that time whether or not he was involved. He thought for a few minutes and said, "Well, I'll go ahead and tell you about it anyway." At this point I advised him of his constitutional rights.

Q Did he ever advise you during this time, sir, why he was relaying this information to you?

A No, sir.

Q I show you State's Exhibit Number One and ask you if you can identify that?

A Yes, this is a true and correct copy of the constitutional rights form which I read to Mr. Messer at the time of interview. It contains a waiver of his right to a lawyer. This statement was signed by him in my presence, and it was witnessed by Agent Cornelius and by Lt. Cobb at that time.

Q Would you explain to the ladies and gentlemen of the jury what these rights are?

A Yes, sir. Would you like for me to read the form, or would you rather that I merely state to them what the rights are?

Q Did you read the form to him, or did you orally advise him of his rights from memory?

A I orally advised him from memory, and I also read his rights to him.

Q Would you advised the jury what you advised him? I don't care if you read it or state it from memory.

A I advised him that he had a right to remain silent, he did not have to answer any questions, anything he said could be used against him as evidence in court, that he had the right to have an attorney present while being questioned, that if he could not afford an attorney that he could have one without cost before answering any questions. I advised him that if he wished to answer questions without a lawyer at that time that he had a right to do so, and that he also had the right to stop answering questions at any time that he decided to do so. I advised him that if he waived his right to a lawyer at that time, that he would still have a right to have a lawyer appointed at no cost to him to represent him and to defend him at any court proceedings that may be had after that.

Q Sir, after advising him of his constitutional rights didn't you, in fact, interview the defendant?

A Yes, sir I interviewed him, but I first determined what his education had been in order that I could determine that he understood his rights, and at that time I asked him what his education had been, and he told me that

he had finished two years of junior college.

Q Sir, this interview that you conducted of the defendant, was this a recorded interview?

A It was recorded, yes.

Q Mr. Golden, I have some tapes here that have been marked as State's Exhibits Number 28 and 31. Is this an interview -- or a recording of the initial interview with the defendant?

A Yes, these are tapes of that particular interview.

JOHNSON: At this time we would like the jury to hear these tapes.

JUDGE: Okay. Any objection?

SHELLEY: All of them?

JUDGE: All of them?

JOHNSON: Yes, sir.

SHELLEY: It is going to take about six hours to hear all the tapes.

JUDGE: What is the purpose of hearing them all?

JOHNSON: The purpose is the jury is going to find all the inconsistent statements the defendant did make.

SHELLEY: I have no objection to playing the tapes in full, with 25 minutes to the side. It seems to me that if we could do the hearing

of the tapes all at one time at another time it would be better so we can complete the examination, but I have no objection to playing them, but it will take something near seven hours to hear all the tapes. The defendant, incidentally, has stated that most if not all of the statements in those tapes were fabrications and not true.

JUDGE: Let's start with the last tape you took.

JOHNSON: In view of that, may Mr. Golden testify to the substance of what this first interview was?

JUDGE: Right, and then lets go to the last tape and let me weigh that a little bit before we make that decision.

BY MR. JOHNSON:

Q Mr. Golden, what was the substance of the first interview with the defendant Messer?

A Basically Mr. Messer stated that he and another individual by the name of Ronnie Brown from Bonifay, Florida, were in the company of a person by the name of Ray King who worked for Ford Motor Company in Bonifay, Florida, and that while they were in his company that he was the one who killed the decedent Henry Fowler. He gave two conflicting statements.

In one statement he claimed that the three of them were together, and they were returning from Mobile, and they visited the South Seas bar in Pensacola, and while they were there Ray King saw Fowler and they became associated there, and King told them that he was going over to show Fowler some property that Fowler wanted to buy, and he stated that they went over to Santa Rosa County and drove over there, and that Ray King and Fowler got out of the car and went back to the back of the car, and King was motioning with his arm this way, and then suddenly he pulled a pistol out and shot Fowler. He stated that King took a substantial amount of money off of Fowler, and that he gave Bonnie Brown $500 of it. This was in one statement. Another statement was basically the same. Of course, he also related that they went on to Crestview and there they picked up Fowler's automobile, and that they drove it back to the rest area where it was left.

We went back the next day and talked to Mr. Messer again, and we explained to him that there were inconsistencies in what he said and what the true facts were. One of those inconsistencies was the time element involved. We knew approximately what time Mr. Fowler left Mobile, Alabama, and he would not have had time to have driven his automobile to Crestview, and caught a

ride back to the South Seas Bar in Pensacola by the time that Mr. Messer said they met him there.

Another inconsistency was the clothing of Mr. Fowler which was such that we felt it would be difficult for him to put the amount of money which Mr. Messer said he had on him in his front pants pocket because he had no belt, and no socks, his shirt was open in the front, and we felt it was difficult for him to have that much money in his pocket without it showing. So, then he changed his story somewhat, and in his second story he said that the automobile was parked in Pensacola. And, of course, he also maintained that they met Fowler at the South Seas Bar -- I believe that's correct, Mr. Johnson.

Q Did he go into detail about how this murder occurred, Mr. Golden?

A In both instances he claimed that Ray King was the one who committed the murder.

Q Did he also indicate in that first statement how Ray King laughed after the murder had occurred?

A Yes, sir.

Q And did he go into such detail as to how Mr. King had placed a file into the end of the pistol after he had shot the man?

A Yes.

Q Did he give any reason why the man took the file and put it in the end of the pistol?

A Yes, sir, he said so that later it could not be determined that the bullet that killed Fowler was the one that was fired from that gun. He said it would mess up the rifling in the pistol. He also said that on one occasion that the motive was robbery, and on another occasion he said that the motive was because Fowler had been involved in drugs with King, and King wanted to kill him because of some of their dealings that they had had in drugs.

Q Did he also indicate during this interview that he had met Fowler before also?

A He indicated, I believe, that he had seen Fowler on one occasion in Bonifay prior to that, yes, sir. He had seen him at a truck stop.

Q He indicated the sum of money that was taken initially was about $8,000, is that correct?

A I believe that's correct, yes, sir.

Q Sir, during this initial interview of January 17th did you have the occasion to show the defendant some photographs?

A I did, yes, sir.

Q I have here State's Exhibit 17, 18 and 19 -- 10, 11, 12, 13 and 14. I ask you to look at those photographs

and ask you to identify them if you can.

A Yes, sir, these photographs were shown to Mr. Messer at the time of my initial interview of him. He identified these photographs. He identified the photographs as being the automobile of the person who was murdered while he was present. He also identified the photographs of the individual shown in them as being the person who was murdered at that particular time. He was asked at that time to initial these photographs, and also to date them, which he did.

Q The initial on each of these photographs of "C.M., January 17, 1974", is that of Charles Messer?

A That is correct, yes, sir.

Q Mr. Golden, how did the second statement differ from the first statement that Messer gave you?

A Mr. Johnson, If I recall correctly, the primary difference was merely in locations as far as where they first met Fowler on that occasion, and the motive for the killing. Mr. Messer continued to maintain that Fowler was killed by Ray King of Bonifay.

Q Did he not also indicate during these first two interviews that after the man was shot that Brown and King drug the body off in the woods?

A Yes, sir.

Q Was there any evidence at the scene that there had been

any scuffle or the body had been drug through the woods in any manner?

A There was absolutely no evidence whatsoever which would indicate that the body had been dragged or that he had been killed any place other than the location where the body was found.

Q After conducting the second interview with the defendant did he agree to return to Florida to assist you in the investigation?

A He did. Yes, sir.

Q How did this agreement take place that he would return to Florida to assist you in the investigation?

A I asked him if he would be willing to do that, and he stated that he would, and he signed an agreement -- in fact, I executed an agreement with the Alabama authorities -- and Mr. Wesser also agreed whereby Mr. Wesser was to be transported to Santa Rosa County, Florida, for the purpose of pointing out to us the location where the murder occurred and where the boy was first abducted and where the automobile was found. Based on this agreement Mr. Wesser was subsequent to that time transported to Florida by Sheriff Roy Snead, City Police Officer Perry Cantrell, and Capt. Bubba Davis of the Alabama State Police Department.

Q Mr. Golden, you mentioned an agreement that was signed

by you, and one signed by Defendant Messer. I show you State's Exhibit Number 3 and 4. Would you identify those for the jury.

A Yes, sir. State's Exhibit Number Three is the agreement which Charles Dwight Messer signed on January 18, 1974, in Anniston, Alabama, agreeing to accompany the Alabama authorities to Florida for the purpose of pointing out the location of the crime, and he also agreed to return to the State of Alabama with the Alabama authorities after he had been to the location.

State's Exhibit Number Four is an agreement which I signed on January 18, 1974, at Anniston, Alabama, whereby I agreed that if the Alabama authorities would transport Mr. Messer to Florida, that I would waive all jurisdiction over him and would agree that he be voluntarily returned to the State of Alabama immediately after he had pointed out the locations of the crime.

Q Was the defendant ever promised anything for coming to Florida to assist you in the investigation?

A No, sir. He was made no promises of any kind.

Q Would it be a fair statement that you never offered him any type of mercy for assisting you in the investigation?

A Absolutely no type whatsoever.

Q Were you also present during the time that he was returned to Florida?

A I was present when he arrived at the Santa Rosa County Sheriff's Office. It was on the morning of January 23, 1975.

Q What was the purpose of being here at that time?

A The purpose in being here at that time was to point out to the local authorities the location of the murder, the location where the victim was abducted, the location where the automobile was abandoned.

Q And didn't he, in fact, point out some of the places for you?

A Yes, sir. We left the Santa Rosa County Jail; we proceeded directly to the scene of the murder; we arrived there; Mr. Messer got out of the automobile; he walked down the road; he was first a little unsure about the location of the road, but once we arrived and got there and we walked down the road he said, "This is it", and he pointed to the tree where the body was found -- by which the body was found -- and said, "That looks like the tree where it occurred."

There was a couch -- when I visited the scene on the first day I observed an old couch which had been abandoned -- had been thrown by the road there -- by a mud puddle. He looked at the couch, and

he said, "I remember that couch, but it was not in this location. It was farther down." I too observed that the couch had been moved. It appeared as though someone had gotten in a bog, and had taken the couch and torn it apart, and moved it down the road, and used it to assist them in getting out of the bog.

Q Mr. Golden, do you remember the manner in which he identified the place where Henry Fowler was shot -- how he described that incident?

A How he described the place?

Q Yes.

A When he described it in Alabama or in Florida?

Q When he was at the scene. Do you remember in what type -- at this point in time was he still identifying Ray King as the perpetrator of the murder, is that correct?

A That's correct.

Q Do you recall him making some comment about where the boy was shot -- do you remember the language the defendant used?

A At all times -- virtually all times -- and particularly at that particular time he was using language or referring to him as a "son-of-a-bitch this", or a "son-of-a-bitch that", "The son-of-a-bitch shot him right here", is what he said.

JOHNSON: At this point in time I will tender the witness.

EXAMINATION BY

MR. SHELLEY:

Q Mr. Golden, did Charles Messer ask for any immunity or special treatment subsequent to his first statement?

A No, sir, he did not.

Q Did you take Brown into custody, or were you able to take Brown into custody after you learned his name in the first interview?

A We returned to Florida, and Agent Cornelius with the Florida Department of Criminal Law Enforcement drove to Bonifay for the purpose of locating Bonnie Brown. He determined in Bonifay from relatives of Brown that he was at that time in Texas. He called Brown in Texas and talked with him. We did not want him to know that we wanted to talk to him about this particular case because we were afraid he may not return to Florida, so Agent Cornelius told him that this department was investigating damage to certain county equipment in that particular county -- which was true -- they were conducting such an investigation -- but it was not true that we wanted to talk to him about that particular investigation. Brown agreed at that time to fly to Fort

Walton Beach, Florida, for the purpose of discussing that particular investigation with the Florida Department of Criminal Law Enforcement. Agent Cornelius made arrangements for the flight for him. He bought the tickets, and he gave him his flight schedule over the telephone. Mr. Brown flew in to Fort Walton Beach per the agreement, and he arrived in Fort Walton Beach somewhere around 11:00, I believe, and then he arrived at the office of the Florida Department of Criminal Law Enforcement in Fort Walton somewhere around 9:00, and the Florida Department of Criminal Law Enforcement began its questioning of him.

I was present when he arrived. I believe those who questioned Mr. Brown were Agent Cornelius and Lt. Cobb with the Santa Rosa County Sheriff's Office.

I was present at the time of his arrival. I was not present in the room with him at the time of the initial interview of him.

Q Was he confronted with Mr. Messer's statement of what had occurred in Florida?

A Mr. Shelley, you will have to ask Mr. Cornelius and Mr. Cobb about what he was confronted with at the time. I was not present in the room at the time.

Q Before I do that, Mr. Golden, I will ask you if you have

that knowledge.

A I was not present in the room at the time.

Q Still, I ask you the question do you have knowledge about...

A I don't know what he was confronted with at that particular time.

Q As of January 15th did you have anyone in custody who you later learned had anything to do with what happened on Garcon Point?

A On January 15th?

Q Yes.

A No, sir, not on January 15th.

Q Did you have the name of anyone connected with what was happening out there?

A No, sir.

Q Did Mr. Brown make a statement?

A Mr. Brown -- after Lt. Cobb and Agent Cornelius had talked with Mr. Brown he made a recorded statement. This was on January -- it was on the night of January 21st and on the morning of January 22nd. After he had completed his statement, which was recorded, he was placed under arrest and he was transported to Santa Rosa County Jail by Lt. Cobb and I. This was in the early morning hours of January 22, 1975.

SHELLEY: I have no further questions.

JUDGE: Anything further?

JOHNSON: Not at this time.

(witness excused)

* *

RECESS (5:00 p.m.)

(Jury permitted to go to their homes and cautioned not to discuss the case or to listen to T.V. or radio accounts of the case, nor to read any newspaper articles in this regard.)

RECONVENE (9:00 a.m., May 25, 1976)

SHELLEY: (To the Court) Your Honor, your local radio station this morning stated that Mr. Golden had made a statement to the effect that he was confident this jury would return a death verdict, so if you would specifically ask that of the jury members, I would appreciate it.

(Thirteen year old Rick Garrett was introduced to the court. He, according to Mr. Shelley, would be observing the trial and assisting in the mechanics of playing recorded statements for the jury.)

JURY SEATED IN BOX

JUDGE: Ladies and gentlemen of the jury, let me ask you a question, and would you answer it outloud. Are each of you here with the same factual knowledge you had when you left here yesterday afternoon?

(No denials)

JUDGE: Have any of you read any accounts of this trial in the newspaper, or heard any accounts of it on the radio or watched it on television since yesterday afternoon?

(Negative)

JUDGE: No one has tried to contact you about this case?

(Negative)

JUDGE: Do you gentlemen require any further examination?

JOHNSON: The State does not, YOur Honor.

SHELLEY: No further questions.

* *

C U R T I S G O L D E N, having been recalled to the stand, testified as follows, to wit:

EXAMINATION BY

MR. JOHNSON:

Q Sir, you are the same Curtis Golden who testified yesterday, is that correct?

A I am. Yes, sir.

Q Mr. Golden, I believe you testified on January 17th you were present in Anniston, Alabama, to interview Defendant Charles Dwight Messer, is that correct?

A That is correct, yes, sir.

Q And approximately what time of day was this, sir?
A The interview was approximately 4:12 in the afternoon. In that area.
Q At this time did the defendant relate to you why he was relaying this information to you, sir?
A He did make a statement to me at that time that he wanted to get it off his conscience.
Q And this is the same time he indicated he was a witness to a murder, is that correct?
A That is correct, yes, sir.
Q Do you have a tape recording of that initial interview in Anniston, Alabama?
A I do. Yes.
Q This is a recording of the initial interview with Messer, is that correct?
A That is correct, yes.
Q At this point in time who was present during this interview?
A There was myself, Lt. Jesse Cobb with the Santa Rosa County Sheriff's Office, Perry Cantrell, a city policeman with the City of Anniston, Alabama; Capt. Davis with the Alabama State Highway Patrol; and I believe, Sheriff Roy Snead, sheriff of Anniston, Alabama.
Q And this was after you advised him of his constitutional rights ennumerated on State's Exhibit Number One?

A That is correct. He was advised of these rights by me orally; this entire rights form was read to him by me; and he affirmatively waived his rights to an attorney at that particular time, signed the rights form -- it was signed in my presence. It was witnessed by Mr. Ronnie Cornelius who was also present at that time, and Lt. Cobb.

JOHNSON: May we play the tape at this time, Your Honor?

JUDGE: Go ahead.

(Tape played for the jury)

Q Mr. Golden, the defendant indicated during his statement that he was, in fact, drunk. Was he drunk during this time?

A He was not drunk when I had my conversation with him. He did have a hangover, and he was somewhat nervous, but he was not drunk at that time. He had been incarcerated since sometime the day before, and this was in the afternoon of the day when I talked with him. He knew where he was at, he knew who I was, he knew what was happening to him, and he seemed to be very rational, and it was obvious in talking with him that his mind -- he had his presence of mind and even remembered the couch that was at the location where the killing occurred. He remembered the trees in the other areas. He

remembered the person who was killed -- the victim.

SHELLEY: Mr. Golden, all this amounts to argument from the witness stand, which we spoke to the court about yesterday. We have listened to the tape, and I don't think this is appropriate...

JOHNSON: Certainly he can describe the man's physical condition.

SHELLEY: He wasn't doing that, Your Honor.

JUDGE: Restrict your testimony to describing the man's physical condition.

A He appeared to be very lucid and appeared to be sober at the time

Q Mr. Golden, did you have occasion to have a later conversation with him in Anniston, Alabama?

A I did, yes.

Q When was this done?

A This was the next day. It was around noon -- maybe 12:00 - 12:15.

Q What was the purpose of having the second interview?

A After the statement was given to us on the 17th, we had a conference and we reviewed it, and we determined that there was a discrepancy between some of the facts which he had stated in his statement, and facts which we had determined to be true in our investigation. One

of those was the fact that he stated the body had been dragged after the victim had been killed. We found no evidence of that at the scene. He stated that the victim had $8,000 on him. We had determined in our investigation that he had only $120 on him. In addition to that, he stated that the money was in 20 dollar bills, and in examining the clothes it was obvious to us that he could not have had $8,000 in 20 dollar bills on him without it being open to the public to see because the pockets of his pants were rather shallow, and the shirt was open. He had no pockets in his shirt. Then, in addition to that, the time elements did not match up. He stated that it was somewhere around noon, 11:30 or 12:00, when they went to the South Seas Bar and encountered the person he referred to as Mike. Our investigation -- and also he stated that his automobile was in Crestview. Our investigation disclosed that the victim left Semmes, Alabama, sometime around noon or a little before then, and then it would have been impossible for him to have driven to Crestview and left his automobile and ridden back to Pensacola or driven back to Pensacola in another automobile and have been there by that time of day which Mr. Wesser said they encountered him.

Q During this interview did he ever make a statement about the Defendant Ronnie Brown?

A Yes, he did. In our conversation with him the first day he told us that he could verify what he was telling us by Brown, who he said was present at the time of the killing, but he told us that he would have to talk to Brown first privately in order to get Brown to talk to us -- that otherwise he would not talk to us and he would not tell us about it.

Q He also mentioned during this statement about the criminal involvement of Brown. Did you have the occasion to investigate the criminal background of Brown?

A Yes, sir, we did.

Q Did he have in his background any criminal record?

A No, sir. He had no criminal record whatsoever.

Q Sir, this second interview which you had with the defendant, was that also recorded?

A It was. Yes, sir.

Q Who was present during this interview?

A Well, what happened was the next day we returned to the jail and we met Mr. Mannis -- Wayne Mannis -- the F.B.I. agent who was there at that time. He is the person to whom Mr. Messer first indicated that he was a witness to the killing in Florida, and it was indicated at that time by Mr. Mannis that Mr. Messer had been a confidential informant for him -- a paid informant. So, I returned to the jail and met with Mr. Mannis

there. I informed Mr. Mannis that there were discrepancies in what Mr. Messer had told us and what we had determined to be the true facts. So, he then talked with Mr. Messer outside of our presence. This was before we saw Messer that morning. He came back and told me that Mr. Messer wanted to tell me the truth -- he wanted to clarify his statement -- tell me the truth. So, there was myself, and Mr. Mannis, and Mr. Cornelius, and Lt. Cobb. We all entered the room where Mr. Messer was at, and he began his statement, and then he told Mr. Mannis that he did not want to give a statement that day in the presence of anyone except me. I asked Mr. Mannis if he would stay as a witness because Mr. Messer apparently had confidence in him. Then I asked Mr. Cornelius and Mr. Cobb if they would leave the room. After they left the room Mr. Messer began giving his statement.

Q How long is that statement, sir?

A That statement is approximately 20 minutes.

Q Do you have a recording of that statement?

A Yes, I do. It is much shorter than the first one was.

SHELLEY: I understand that statement is in evidence?

JOHNSON: It had already been admitted into evidence.

(Tape of January 18, 1974, played for the jury)

GOLDEN: If I could clarify one thing I stated earlier -- Mr. Cornelius and Mr. Cobb left the room at the beginning of this statement. In between the change of the statements they came back into the room and they were present during the recording of the last five minutes of the statement.

Q You also mentioned advising the defendant of his rights. I show you State's Exhibit Number Two. Is that the rights form?

A Yes, sir. This is the constitutional rights form which was at that time shown to him, and it is identically the same as the one which he had read the day before, and he signed this form in my presence immediately before giving the last statement which was played here.

Q After taking this last interview of him did you have the occasion to discuss with him his coming to Florida?

A Yes, I did.

Q What was the purpose of that?

A The purpose of it was for him to come to Florida to point out to local law enforcement agencies the location where the murder occurred and the location where the automobile was left.

Q I have here State's Exhibits Number Three and Four...

A State's Exhibit Number Three is an agreement signed by the defendant...

SHELLEY: Excuse me, Mr. Johnson. We did all of this yesterday afternoon. These things are in evidence. They were introduced into evidence yesterday afternoon, they were read to the jury, and now we are doing it again.

JUDGE: Is that the same...

JOHNSON: Yes, Your Honor, but we are trying to get a continual approach to the problem.

Q This is the same paper that you identified yesterday, Mr. Golden?

A It is, and it is an agreement whereby he agreed to come to Florida for that purpose and to return to the State of Alabama with the Alabama authorities.

Q And did he, in fact, subsequently return to Florida?

A He did. Yes, sir. And State's Exhibit Number Four, of course, is the agreement which I had with the State of Alabama that he would be returned if he came to Florida.

Q Did you continue with this investigation until the time the defendant was charged with first degree murder and robbery, sir?

A I did. Yes, sir.

JOHNSON: That's all I have.

EXAMINATION BY

MR. SHELLEY:

Q Were you able to ascertain, from the statements and the investigation that you indicated were on-going, whether or not Ronnie Brown left the automobile at the scene?

A Mr. Shelley, all I can do is refer to the statement of Mr. Messer -- the last statement of Mr. Messer -- and also the two statements by Ronnie Brown. Ronnie Brown gave two statements, and in the first statement he indicated he did not leave the car, and in the second statement he indicated he did. Mr. Messer in his last statement, and, of course, in all others, and in his last statement indicated that Mr. Brown left the automobile.

Q When Mr. Messer -- Charles Messer -- agreed to come back to Florida -- why I ask, Mr. Golden, is so much of today was repetitious of what we did yesterday and...

JOHNSON: I object, Your Honor.

SHELLEY: Well, I have indicated to him I am not trying to ask the same questions yesterday.

Q I believe you indicated that these statements that Charles Messer had given were,confronted Brown when he

came in from Texas, did I understand that to be your testimony?

A No, sir, I did not give that answer yesterday. I told you yesterday that I was not present in the room when the initial interrogation of Brown began, and consequently I had no personal knowledge of whether he was or was not confronted with it. Now, my investigation -- if you would like my understanding from my investigation -- my understanding from my investigation is that Mr. Brown was not confronted with it because we did not want Mr. Brown to know what Mr. Messer had told us because if what he had told us was not true we did not want Mr. Brown to be able to give him corroboration on that point.

Q You mentioned that a number of conversations took place off the record. I believe the first tape -- there was the reference there by one law enforcement officer that this was not the discussion they had had the day before?

A Just to clarify that, the person that made that statement was Wayne Mannis, the F.B.I. agent. He was referring to the conversation which he had with Mr. Messer the day before we arrived, and it was from this conversation that we determined that Mr. Messer was a witness to a murder in Florida.

Q Let me get it clear in my mind. Before you went up to

Anniston you had no suspect. When you came back you had Mr. Messer who had indicated he had identified the scene, and he had identified the car, and he had identified the body, he had given the name of Ronnie Brown, and he had agreed to come to Florida, and you also had Ronnie Brown in custody?

A That is correct, and he also tried to send an innocent man to the electric chair.

Q Was there any chance of this innocent man -- innocent of this crime -- of going to the chair based on what Mr. Messer told you?

A If he had been believed, and if his testimony had accorded with the facts and had been believed, and the jury had believed it, he could have, yes. Very well.

Q Well, would you have checked out his statement? Did you check out his statement?

A Yes, sir, and because we did do that and did not accept it, we were able to determine that he was innocent. But, if we had accepted the statement of Mr. Messer it was his intent that this man go to the electric chair -- or he be convicted of first degree murder.

Q You say that was his intent. Do you know what his intent was?

A Apparently it was, Mr. Shelley.

Q Well, are you taking into account, when you give that

opinion, sir, his request for some negotiation before he made any statement? I believe he several times asked you for that?

A That is correct, sir.

Q And on every occasion, even after he would give you additional information and additional information and additional information, you never at any time made any promise?

A No, sir. The only time we discussed that was at the very beginning when he asked for immunity and I refused to give it to him, and, of course, after that he never mentioned it again.

Q I believe he made a final statement in which he said he would be willing to take a lie detector test on anything he was saying in that statement. Were you present at that statement?

A I was not present.

Q Did you have access to it?

A Yes.

Q Did you check out that statement?

A Mr. Shelley, we performed a full investigation of this case, and we compared all the facts to that statement, yes, sir -- the facts which we had at hand.

Q You indicated Mr. Brown had no prior record. I believe on all the statements -- I just don't know how many --

there were numerous instances of where both Brown and Messer described criminal activity ranging from robbery to burglary -- there were several robberies, several burglaries -- that were thwarted by one event or another that made the particular offense impossible, or that they couldn't do it. When you testify he has no prior record you are telling us that he had no record for which he had been arrested and taken to court for? You weren't indicating...

A Let me clarify that if I may, please.

Q Please.

A We determined that Mr. Brown had no record prior to meeting Mr. Messer. We determined that he had no record of an arrest or a conviction before or after meeting Messer. On the basis of the statement of Mr. Messer as well as Mr. Brown, apparently they had been on the course of criminal activity for some time prior to the time that this killing occurred. But, I emphasize again that we found no evidence of any criminal activity on the part of Mr. Brown before he met Mr. Messer.

Q Now, the statement that Mr. Messer gave about his education, did you check that out?

A No, sir. We accepted that as being correct.

Q Is it generally true that anything that seemed to hurt

him you accepted, and anything that seemed to help him you rejected?

A Not necessarily, Mr. Shelley. The reason that I did not go further with his education is that that was not really germane to the issues involved. It was not important except for his ability to understand his rights when they were given to him and to understand what he was telling them. It was obvious to me in talking to the man that he was very intelligent, he was very lucid at that time, and he knew exactly what was happening, so I saw no need to go any farther with an investigation of his education. And, in addition to that, I had no reason to believe he had any motive for lying to me about his education.

SHELLEY: I have no further questions.

EXAMINATION BY

MR. JOHNSON:

Q Mr. Golden, Mr. Shelley mentioned a lie detector or polygraph examination. Would you tell the ladies and gentlemen of the jury if these are admissible in evidence?

A Mr. Johnson, they are not admissible in evidence, and they are not admissible because they have never been proven to be scientifically correct and reliable.

Q And that is the reason you did not consider...

A That is the reason, and the reason I have never relied upon those in my investigations.

Q During the course of your investigation did you have the occasion to learn how co-defendant Brown met the defendant Messer?

A Yes, sir, it is my understanding that they met while Mr. Messer was incarcerated in jail in Bonifay, Florida.

Q Do you know how it came about that Brown met Messer there, sir?

A It is my understanding that Mr. Brown's brother-in-law was a juvenile counselor in Bonifay, and it was through the visits of Mr. Brown to the jail while Mr. Messer was in jail that he met him.

Q During the course of your investigation, sir, did you have the occasion to learn who was apparently the leader in this criminal activity?

A Yes, sir. In talking with Mr. Messer and talking with Mr. Brown in investigating this matter it became obvious to me that Mr. Messer was the more intelligent of the two. Mr. Brown had an eighth to tenth grade education. He was of rather low intelligence. He seemed to be the type of person who was a follower. Mr. Messer on the other hand was a leader, and it appeared that at all times that the defendant Mr.

Messer was the one who was the dominant influence in the relationship.between the two.

SHELLEY: Excuse me, Mr. Johnson. At this time I renew my motion that was raised yesterday in regard to arguing before the court. If the court will rule, rather than taking the jury out of the jury box...

JUDGE: Denied.

Q Mr. Golden, did any of these reasons have bearing on the reason you accepted a plea to second degree murder by the co-defendant Brown?

A Yes -- those and other reasons.

Q What were those other reasons?

A Well, as I stated before, Mr. Brown had no previous record of criminal activity prior to the time he met Mr. Messer. This particular reason -- and also, it was actually through Mr. Brown's cooperation and his statement that we were able to solve this case and arrive at the truth. It is true that Mr. Messer first mentioned the fact he was a witness, and it was through his statement to Mr. Mannis that we were able to determine that he and Mr. Brown were suspects in the case, but it was not through his cooperation that we solved the case: it was through the cooperation of Mr. Brown. Mr. Brown was very remorseful about it. He cried quite a bit in

the interview at the time that he told us about it, and he was quite cooperative. And it was for these reasons that I felt that these mitigating circumstances outweighed or neutralized the aggravating circumstances in the case. And, under the law, if a person is convicted of first degree murder and the jury recommends mercy, and the judge accepts that, then the penalty is life imprisonment. Under the law the maximum penalty for second degree murder is life imprisonment. So, I felt that rather than to -- I felt that the mitigating circumstances neutralized the aggravating circumstances in his particular instance. And, I felt for that reason that the jury in all probability would recommend mercy, and the judge would probably grant that, and I felt that there was no reason to put the State of Florida to the expense of trying him if he would plead guilty to second degree murder and his maximum penalty could be the same as under first degree. So, I accepted the plea to second degree murder with the opinion that he would in all probability receive life imprisonment.

Q Was there any negotiation between the State of Florida and Defendant Brown as to what sentence he would receive?

A There was absolutely no negotiations whatsoever. The only negotiation was that the State of Florida would

allow him to plead guilty to second degree murder, and it would be left to the court to determine what the sentence would be, and I was of the opinion at that time that it would in all probability be life imprisonment.

Q But, in fact, he received a lesser sentence, is that correct?

A That is correct. He received 30 years in prison, but this was not due to any negotiation on the part of the State of Florida.

Q He entered a plea with no recommendation from the State of Florida, is that correct?

A That is absolutely correct.

Q And that was Judge Wade that sentenced that defendant instead of Judge Wells, is that right?

A I believe that's correct.

Q You mentioned remorse on the part of Defendant Brown. Is there any remorse on the part of the Defendant Messer?

A Absolutely not -- not one note of remorse in his voice as he told about it.

Q Would you describe it as maybe an attitude of contempt for the deceased?

SHELLEY: Your Honor, the objection will be renewed throughout, rather than interrupt you

in testimony. It is impossible to rebut this type of evidence. There is no way we can cross.

JOHNSON: Your Honor, according to the statute it is not limited to the strict rules of evidence in normal proceedings.

SHELLEY: I'm not asking for strict rules of evidence. I'm just asking for an opportunity -- let me understand your ruling?

JUDGE: The court has ruled that it will allow questioning regarding the physical characteristics demonstrated by Defendant Messer and the Defendant Brown, but it is going a little far when you get into the area of the law when it is the prerogative of the court to do that.

With that in mind, you may proceed.

BY MR. JOHNSON:

Q Was there any particular reason, Mr. Golden, why you didn't negotiate a plea to second degree murder with Defendant Messer?

A Yes, sir, there was.

Q What was that?

A Well, for one thing there were four aggravating circumstances detailed by the statute present. It was a

heinous and cruel...

SHELLEY: Your Honor, at this time we would renew the objection...

JUDGE: That objection will be sustained.

SHELLEY: Thank you.

Q You started renumerating, sir -- there were aggravating circumstances in your opinion, is that correct?

A That is correct. Yes, sir.

Q Itwas for this reason that no ...

SHELLEY: Your Honor, he is continuing to do the same thing. The court just sustained my objection.

JUDGE: I will let him express his opinion that they were aggravating circumstances, but the jury will draw their own conclusions as to whether or not they were aggravating circumstances and what they were.

A Mr. Johnson, I found no mitigating circumstances.

Q And it is for this reason he was prosecuted for the crimes he was charged with?

A That is correct.

JOHNSON: Thank you. That is all.

JUDGE: Mr. Golden, was it part of your agreement with Brown that he testify against co-defendant Messer?

A No, sir, it was not.

JUDGE: Mr. Shelley, do you have any more questions?

SHELLEY: Oh, yes, sir, I have a considerable number of questions.

EXAMINATION BY

MR. SHELLEY:

Q Mr. Golden, did you have ample evidence to believe that you could establish before a jury for their determination that Mr. Brown was guilty of first degree murder?

A Yes, sir.

Q What is the difference between the life sentence that a jury may give a defendant convicted of first degree murder, as opposed to a possible life sentence given a person in second degree?

A The only difference, Mr. Shelley, is the period of time in which they are eligible for parole.

Q With that only difference could you state -- clear it up for us.

A Yes, sir. Under the statute a person convicted of first degree murder and sentenced to life imprisonment cannot be paroled in less than 25 years. A person convicted of second degree murder and sentenced to life imprisonment may be paroled in less than that period of time.

Q As a matter of fact, Mr. Brown will be eligible for parole in June, is that not true?

A Well, I wouldn't say "eligible". He's qualified for parole, but not necessarily eligible. Under the law the parole department must review the file of each inmate every six months, and consequently they must review his file within six months after he is incarcerated. In accordance with their policy, and if they find that he is eligible, then they can parole him if he's qualified under the law to be paroled, but this doesn't mean that he's eligible under the parole regulations and provisions.

Q But the point is that there is no requirement under the law that Mr. Brown serve a day longer than the Florida Probation and Parole determines is necessary?

A According to their rules and regulations, yes, sir.

Q Whereas, in the case of first degree murder convictions the Florida Parole and Probation Department could all be unanimously in favor of a parole say after 21 years, but he must serve an additional four years before he would be considered for parole?

A That is correct. He must serve at least 25 years before he can be considered.

Q Mr. Golden, I would like to make reference to page 7 of a transcript of Mr. Brown's second statement at the bottom of that page, and play that portion of the tape. If you would like to follow with me -- Mr. Golden, I

wonder if you might listen to this.

(At this time a portion of a tape was played. This court reporter was not provided with a copy of the transcript, and the tape was at times inaudible)

Q Mr. Golden, did you ever personally, or by one of the law enforcement agents question Brown in the following areas: "Mr. Brown, the tools that you have indicated earlier in this statement that were handed to you by Mr. Messer and that you put in the back of the car -- what happened to those tools?"

A I'm sorry, Mr. Shelley, I didn't understand you.

Q Did you ask Mr. Brown whether or not he had a wrench or any other tool, and did he hit Mr. Fowler as he walked -- as he indicated in the statement -- that he walked with Mr. Messer -- and Mr. Fowler -- out by the tree, and they walked out there by the tree, and he was present at what he calls the "commotion". Did you ever at any time or through any one of your agents ask Mr. Brown what he did?

A Mr. Shelley, I personally did not ask Mr. Brown. I was not present during the taking of this conversation or of the previous conversation, and I was not present at all conversations by the other officers with Mr. Brown, and consequently I don't know what was asked of

him other than what I've heard played on the tapes.

Q Did you have access to the tapes -- did you listen to them in this investigation that you were conducting?

A I have read transcripts of these two tapes.

Q Well, yes, sir. The transcripts were typed up. Did you read the transcripts?

A I read the transcripts of the two tapes, yes, sir.

Q Did you see in there anywhere that anybody asked Ronnie Brown what he did as he walked with Mr. Messer and Mr. Fowler out to that tree? Did he have anything in his hand? Specific question, "Did he have anything in his hand?" Did he ask that question?

A Sir, I don't recall. You have the tapes. You can play them.

Q We are going to play them, Mr. Golden, but I'm asking you, because you have testified as to what was in all these other tapes and your reasonings on it. I didn't ask -- what I'm asking now -- did you or anybody under your direction ask Mr. Brown, to your knowledge, did he have anything in his hands as he walked out to that tree?

A Mr. Shelley, I was present at the taping of the other two -- the two of Mr. Messer -- and, of course, I recall those. I was not present at the taping of these two. I personally never asked Mr. Brown that question.

Q Do you know anybody who did? You've read the transcripts, I take it?

A I've read the transcripts, but I don't recall whether or not that question was in there.

Q Whether he struck Mr. Fowler -- whether Mr. Brown struck Mr. Fowler -- was that question asked to your knowledge?

A I don't recall.

Q I believe in that statement a little bit earlier -- I believe at 158 on the calibration -- where he describes the shooting...

JOHNSON: Is this tape in evidence?

SHELLEY: It was copied by a specialist in the clerk's office from the tapes that were in evidence.

JOHNSON: Then I think you need to mark it.

SHELLEY: We will mark this tape and introduce it into evidence. But, in the meantime, if there is any question about the reference -- the record that I have here is the reference to the tapes that I used.

Q Mr. Golden, I wonder if you might listen to Brown's final version of what happened as far as the shooting when the gun went off.

A Are you going to play the entire tape now?

(Tape played)

Q Mr. Golden, as I understand his description he is indicating he is there. Were any questions asked pertaining to that situation -- specifically, did he have anything in his hands?

A Mr. Shelley, here again, I was not present during the conversations that were taped, and I was not present during their preliminary conversations with him. I don't recall. I can tell you this, though -- from reading the transcripts of these tapes I formed the opinion and impression...

SHELLEY: I'm going to object...

A ... the indication was that Mr. Messer had...

Q Mr. Golden, I have made an objection, and you are acquainted with the rules -- that the judge has to rule on my objection. If we can conduct it that way, I would appreciate it.

A Certainly, sir.

JUDGE: Don't express an opinion at this point. Just respond to his question to the best of your ability.

Q Mr. Golden, were you present when Mr. Cornelius lied to Mr. Brown out in Texas that you indicated to us yesterday -- to get him to come back to Florida?

A I was not present when Mr. Cornelius had his conversation with Mr. Brown.

of the law and the evidence. Mr. Fleming can argue his own motion -- it is his motion -- but I want it clearly understood that we are not suggesting that Mr. Golden failed to execute a duty required of him by law, or broke a statute, or committed any offense against the laws of the State of Florida.

FLEMING: That was my point, Your Honor, and I do not suggest misconduct on Mr. Golden's part as elected State Attorney and as the prosecuting attorney. Prosecutors do have discretion ...

JUDGE: How does the discretion which he exercised in one defendant's case mitigate in favor of the other defendant? That's what I'm asking you.

FLEMING: Your Honor, we have shown circumstances here, and the evidence has shown by Mr. Golden's own testimony that these two defendants participated in the same...

JUDGE: I recognize and accept the fact -- accepting that argumentum -- but take now that he has exercised that discretion against one that is equally guilty with the other -- and assume for the sake of argument that they are equally guilty. How does that mitigate in favor of your defendant? That is what I'm asking you.

FLEMING: Your Honor, it makes Mr. Wesser no less guilty of the offense, but what it does do is to point

out the arbitrariness with which the death penalty can be applied in this nation of ours -- such arbitrariness that the Supreme Court of the United States has criticized the decision of Furman vs. Georgia in which this present statute in Section 921 of the Florida Statutes attempted to alleviate by setting forth specific aggravating and mitigating circumstances by which those ennumerated circumstances alone determined which penalty a person was to receive. We have expanded beyond those ennumerated circumstances, Your Honor, and entered into others which the legislature had not permitted, thereby showing, Your Honor, that there are indeed...

JUDGE: Mr. Fleming, you are arguing the same thing that has been argued before the Florida Supreme Court as the basis for declaring the statute unconstitutional. The court has ruled that it is constitutional, and your purpose in being here today is for the jury to hear the mitigating and aggravating circumstances. I am going to deny your motion.

(The jury, which had been removed from the courtroom during the argument on this motion, was returned to the jury box.)

EXAMINATION OF MR. GOLDEN

BY MR. SHELLEY (continued)

Q Mr. Golden, as Mr. Kanpp testified in the trial yesterday and indicated he had occasion to look in Mr. Fowler's trunk and there to view several tools that were in the trunk, and he drew a picture of one of them as being the type or variety of tool. That tool he indicated, I believe, was "yeah" long, and then it was described as from 18 inches to two feet long.

A This was whose testimony?

Q Mr. Knapp. He was a friend of Mr. Fowler's.

A Yes, sir.

Q Did you ask -- or do you know anyone who did ask Mr. Knapp about that type of tool or the type of tool that might have been used to produce a blow such as was found in the back of Mr. Fowler's head?

A Mr. Shelley, I recall talking with a member of the family of Mr. Fowler -- I believe it was his father-in-law -- who described the tools that were in the luggage compartment of the car. He stated there were tools there, and he described those tools. I believe he had mentioned that they had some kind of letters on them -- a-p-c, or something like that.

Q Mr. Golden, did you ever consult with the pathologist in this case relative to his opinion after viewing the

Q Did you know he was going to do that?

A I was under the understanding that he was, yes, sir.

Q As a matter of fact, without you being present with many law enforcement officers whom you direct and guide in the enforcement of the law -- you are not physically present, but they report to you as to what is going on, and you make the benefit of their investigation in your determinations, is that correct?

A During these investigations they do make some reports, but it is not a situation where they are required to report to me on all of their activities on everything they do, and they do not make a verbatim report of everything that is said or everything that happens. They do brief me occasionally on what the situation is from time to time.

Q Well, as I understood your testimony you spent -- and the law enforcement officers -- literally thousands of man hours...

A All agencies involved, yes, sir.

Q And you produced absolutely no suspects that were later connected with the case, and yet you took an hour and 10 minutes, and then a 20 minute statement from Mr. Messer, and you came to the conclusions and reasons that you described to the jury, based on that investigation. Let me ask you this -- when you were making

those reasons and those determinations about Mr. Messer of which you had personal knowledge, did you take into account his last statement that Mr. Messer made?

A I don't follow your question. When I came to those...

Q Were you present at this statement -- the last statement?

A The last statement that was given?

Q Yes.

A No, sir. I was not present.

Q Well, you made your determinations based on statements in which you knew he was lying? You were firmly convinced of that -- that he was not telling you the truth?

A My determinations at what point, Mr. Shelley?

Q Determinations of what plea should be entered as regard to Brown.

A I see. In making that determination I took into consideration all of the statements that had been given by Mr. Brown as well as Mr. Messer.

Q Did you take into account his explanation of what occurred to the extent of confronting Mr. Brown with Mr. Messer's statement?

A At the time that this determination was made, Mr. Shelley, all parties had attorneys, and it was not a situation where I could go back to Mr. Brown and talk

to him in regard to this.

Q When Mr. Brown had a private attorney -- the Askew law firm -- Levin, Levin, Askew and Warfield?

JOHNSON: Objection. Objection.

SHELLEY: I'm just trying to ask him -- is that not true.

A He was represented by Mr. Rod Magie.

JUDGE: Objection is overruled.

Q Of that firm?

A Yes, sir.

Q And I believe at all times Mr. Messer had no counsel until the public defender was appointed?

A Well, actually, Mr. Brown was advised by the Public Defender's Office prior to the time that he retained -- his family retained Mr. Magie.

Q I believe less than 30 hours in Fort Walton?

A No, sir, it was here in Santa Rosa County. He was advised by Mr. Peter Mitchell who was with your office at that time, Mr. Shelley.

Q After he had made his statements.

A It was after he had made one statement but before he made the last statement.

Q Are you telling me that before Mr. Brown made the second statement he had an attorney, Mr. Peter Mitchell?

A Yes, sir. Mr. Peter Mitchell met with him and talked to

him.

Q And he made the statement after that?

A That is correct, yes, sir.

Q Did Mr. Messer receive any promises for his final statement?

A No, sir, absolutely no promises at all.

Q Did you, or anybody that you know of in law enforcement, specifically confront Mr. Brown with Mr. Messer's version of the incidents that occurred?

A Mr. Shelley, I never confronted him with it.

Q Do you know anybody who did?

A All I know is the transcripts which I have read, and on those transcripts it appears that he was not confronted with it.

Q Were your investigations ever able to demonstrate the occupations or the vocations of Mr. Brown and Mr. Messer -- other than crime?

A I don't recall the occupation of Mr. Brown. I know that the information was available to me, and I had that knowledge at one time, but I don't recall today what his occupation was, but I do recall that his education was either eighth or tenth grade education. I do recall that he was of low intelligence. In fact, I recall the testimony of the psychologist who stated that he was extremely poor in the assimilation of words

and in the understanding of words and their uses, and he stated that he was a poor student in school.

Q Mr. Golden, I asked him about that too, and about his intelligence. He did succeed in being present at the commission of first degree murder in this county, and had the opportunity and occasion to be sentenced to the natural life imprisonment, and never be asked whether he participated in it. Did you work that into your formula for intelligence?

A No, sir, I disagree that he has never been asked if he participated in it. I think he gave two statements indicating that he did participate, and was a very material part of not only the abduction and robbery, but the murder.

Q Mr. Golden, was it not your impression that Mr. Brown never actually was present during the commission of this crime?

A No, sir, not that he was never present. I think he was present at the scene at the time of the crime. It was my impression, and my understanding, and my conclusion that Mr. Messer is the one who actually committed the murder. He's the one who pulled the trigger that caused the man's death.

Q Do you recall your deposition being taken last Wednesday?

A Yes, sir.

Q In your office?

A Yes, sir.

Q By me?

A Yes, sir.

Q Do you recall on page 19 -- "I came to the conclusion that Ronnie Brown had no actual participation in the killing itself. I came to the conclusion that Charles Messer struck Fowler in the back of the head with a pistol and then he shot him." Do you remember that statement?

A Yes, sir, that's correct.

Q If I understood the factual situation taken by either of Mr. Brown's statements -- that he was in the company of Mr. Messer when they stopped at a rest stop and commandeered Mr. Fowler's car at gunpoint with a gun that was purchased by Mr. Brown and financed by him?

A With Mr. Messer being present at the time.

Q A gun that Mr. Messer couldn't get.

A Because he is a convicted felon, yes.

Q Because he is a convicted felon. Mr. Brown got him that gun?

A Right.

Q Then Mr. Brown drove the automobile away from the rest stop?

A That's correct.

Q And drove it to a remote area?

A That's correct.

Q And although he first indicated that he never got out of the car because he was too drunk -- in the second statement he did indicate that he was with them up until the point he was shot, and what he refers to as the "commotion"?

A That's correct.

Q And you have testified that based on that it was ample evidence to convince you that he could be convicted of first degree murder?

A That's correct.

Q And you came to the conclusion that he had no actual participation?

A I came to the conclusion that Mr. Wesser is the one that actually killed the man.

Q Well, I appreciate that, and I'm sure Mr. Johnson will let you testify to other things, but I asked the question that you came to the conclusion that Ronnie Brown had no actual participation in the killing?

A I came to the conclusion, Mr. Shelley, that Ronnie Brown participated in the abduction, participated in the robbery, and that he was present at the time of the actual killing -- which made him guilty of first

degree murder, the same as Mr. Messer who is the one who actually pulled the trigger and killed the man.

Q Mr. Golden, did you make any comments to the local radio station, WKCC I believe is the station?

A No, sir.

Q So if they quote you on that radio, that never occurred?

A I made no statements to any news media yesterday, Mr. Shelley.

Q Radio -- WKCC.

A Any news media -- radio, television or newspaper. If they quoted me, then it is incorrect.

Q What did Mr. Brown give you?

A Pardon?

Q What did Mr. Brown give you by way of evidence?

A What did he give us?

Q Yes.

A Well, you have his first statement, Mr. Shelley, in which he...

Q But we're in the area of your opinion about it, Mr. Golden -- not facts for this jury to reach their conclusion, and my question leads to your opinion which they must consider.

A Well, he was the first one to admit that the abduction and the killing was actually perpetrated by he and Mr.

Messer.

RECESS

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FLEMING: The defendant at this time would move to discharge the jury and move the court to impose a sentence of life imprisonment upon the defendant here today on the ground that the prosecuting attorney in this case has impermissibly exercised arbitrary discretion by permitting the accomplice Ronnie Brown, against whom the prosecuting attorney had ample evidence of first degree murder, to plead to a lesser offense. The Legislature of the State of Florida, Your Honor, has determined that a person guilty of first degree murder is guilty of a capital offense and must mandatorily receive a minimum of 25 years in prison upon a life sentence, and possibly the death penalty. If there are not sufficient aggravating circumstances to outweigh the mitigating circumstances, then, of course, the lesser punishment of the minimum 25 years in prison must be imposed. But, instead, the prosecuting attorney has impermissibly, inconsistently with the evidence permitted the co-defendant or the accomplice Ronnie Brown to plead to a lesser offense despite the evidence, thereby clearly violating the mandate of the Legislature of the State of

Florida.

The statute which purports to set forth very stringent standards for determining whether a person is guilty of a capital offense of first degree murder should receive a death penalty or should receive a life sentence as opposed to the death penalty. Nowhere in those criteria does it give the prosecuting attorney authority to lessen the degree of guilt.

JUDGE: Mr. Fleming, let me ask you a question. Assuming for the sake of argument that Mr. Golden abrogated his responsibility or was guilty of some misconduct or violation of the statutes in accepting the plea from Brown, how does that affect Mr. Messer?

SHELLEY: Your Honor, I would like to make it very clear at this point that there has been no indication from my office -- the Office of Public Defender, First Judicial Circuit -- that Mr. Golden has ever done any violation of statute or failure to exercise his responsibility of the law.

JUDGE: I thought that was what he was arguing?

SHELLEY: No, sir. As I understand his argument, he has exercised a discretion so that two individuals that should have been in the first degree range of penalty -- he has used his discretion arbitrarily to let one out of that circle -- not giving equal protection

the internal portion of the wound -- what might produce a blow like that?

A I read his written report -- his autopsy report.

Q Did you ask him specifically whether or not there was any possibility or probability of the gun that you came in possession of as having caused the blow to the back of Mr. Fowler's head?

A Mr. Shelley, if I recall correctly his report indicated that the blow was caused either from -- I believe he stated a sharp instrument -- if I could have a copy of that report...

Q Specifically my question is did you ever call on the telephone, or do you know anyone who did, or saw Dr. Birdwell in person, and ask for hisopinion as to the type of instrument that would produce that kind of a blow?

A Mr. Shelley, his report indicated the type of instrument he thought could have produced it. As you know and I know, after having been in many of these cases, he could not say exactly what type instrument -- whether it was one particular instrument or another. All he could do is give a general description of the type which he feels that it could have been, and in his report he stated that it most likely was made by a somewhat sharpened instrument or possibly a rounded

blunt instrument -- one of the two. And, in my opinion, this could fit a gun -- yes, sir -- a gun barrel.

Q You indicated in your testimony "as you and I both know". I wish you would leave me out of that opinion. Now, you reviewed the autopsy report that is dated what date?

A It is dated November 27, 1973.

Q That is when he did the autopsy?

A That is correct, yes, sir.

Q Do you know when it was received by your office?

A I do not.

Q Specifically, did you personally consult with Dr. Birdwell relative to the wound in the back of Fowler's head?

A I did not talk with Dr. Birdwell personally. I used his report.

SHELLEY: Thank you very much.

JUDGE: Any re-direct?

EXAMINATION BY

MR. JOHNSON:

Q Mr. Golden, have you had the occasion to see lacerations on people's heads?

A Yes, sir.

Q On how many occasions?

A I couldn't estimate, Mr. Johnson -- it's been so many

times. I've been prosecuting now for 15 years, and during that time I have seen a lot of them.

Q And is this how you came to the opinion that it is possible that the pistol caused this blow?

A That is correct. Yes, sir.

Q Mr. Shelley referred to a blow on the back of the head. Was there any evidence that this blow was caused by Ronnie Brown, other than the statement that Defendant Messer made?

A We were unable to find any physical evidence whatsoever to indicate that it was from a tool or tire tool caused by Ronnie Brown, other than the last statement of Mr. Messer.

JOHNSON: That's all I have.

EXAMINATION BY

MR. SHELLEY: I don't want to belabor the point, but that is in light of the fact that you didn't do anything affirmatively yourself or direct any law enforcement agents to check out that last statement. Did you go back to the scene at Garcon Point, or anything of this sort?

A Mr. Shelley, the scene was covered in very minute detail at the time of the investigation of the crime.

Q Specifically, my question was after you received

Mr. Messer's last statement and Mr. Brown's last statement, nothing was done affirmatively towards the investigation of what Mr. Messer had said -- what Mr. Brown said?

A It is my understanding that there was some contact with the police agency in Texas where Mr. Brown's Ranchero was located, from the standpoint of determining if there was any tools or anything in the car at that time -- and the tape deck also. I doknow that Mr. Davis went to Mr. Messer's house and talked to his wife about some evidence. I'm not sure what evidence was included.

Q Mr. Golden, there was one other matter -- it's a minor thing -- could you tell us specifics of this consultation with Mr. Peter Mitchell and Mr. Brown?

A It is my understanding...

Q Could I interrupt? It is my understanding -- we can find no indication that Mr. Mitchell conferred with Mr. Brown before he made his second statement. That's what I'm asking you.

A If you have listened to Mr. Brown's statement, he states in there that he has a lawyer and his lawyer is a public defender, Mr. Shelley. It is my understanding that Mr. Brown was placed in a line-up on that particular day, and that prior to being placed in the line-up that he

did talk with Mr. Peter Mitchell, and possibly after the line-up.

Q What I am asking is do you have any personal knowledge...

A I have no personal knowledge of it. I was not present at the time. This is merely my understanding from what I have been told.

SHELLEY: Thank you, Mr. Golden.

Your Honor, I have no further questions.

JOHNSON: The State has nothing further.

JUDGE: You may step down.

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RECESS

FLEMING: Dr. Anthony Semon, a clinical psychologist, will be a witness the defense will call at this time at the graciousness of the state attorney, Mr. Johnson, because Mr. Semon needs to be in Pennsylvania in a few short hours. We are going to put his testimony on now at this time, and the doctors have requested that Mr. Messer not be present during the testimony of both of the witnesses.

JUDGE: Mr. Messer, you understand that you have a right to be present and face any witness that appears to testify in this case? You are aware of that right?

DEFENDANT: Yes, sir, I am.